S. HRG. 102-100

AMENDING THE FEDERAL POWER ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

S. 106

TO AMEND THE FEDERAL POWER ACT

JUNE 5, 1991

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AMENDING THE FEDERAL POWER ACT

WEDNESDAY, JUNE 5, 1991

U.S. SENATE,
SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room SD-366, Dirksen Senate Office Building, Hon. Bill Bradley, presiding.

OPENING STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Senator BRADLEY. The subcommittee will come to order. I would like to welcome our witnesses to the Subcommittee on Water and Power.

Today's hearing is on S. 106, Senator Craig's legislation to amend the Federal Power Act and reverse the U.S. Supreme Court's decision last year on the *Rock Creek* case.

I have looked forward to this hearing and to the opportunity to think seriously about the issues that are raised by S. 106. Senator Craig has presented the subcommittee with what I think anyone would admit to be very important questions. For example, how can a State's legitimate interest in managing water inside its borders be reconciled with the national interest in hydropower development and protection of interstate and international concerns?

Another question, an important question: Are we capable of changing a long-settled area of Federal law without creating more problems than we hope to solve?

The answers to these questions and many others that I think are enormously important are far from resolved in my own mind. I do not see much reason why Congress should join the ideological tug-of-war unless it is very clear that the Supreme Court was wrong. On the other hand, if the state of the law is creating genuine problems, we do have an obligation to try to provide some kind of remedy.

So I am very much open on this issue. I would find it most helpful if today's witnesses could explain specifically what practical problems the *Rock Creek* decision has created and what sort of remedy they believe would be in order, what sort of specific remedy.

[The text of S. 106 follows:]

102D CONGRESS
1ST SESSION

S. 106

To amend the Federal Power Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 14 (legislative day, JANUARY 3), 1991

Mr. CRAIG (for himself and Mr. SYMMS) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To amend the Federal Power Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9(a) of the Federal Power Act is amended by adding a new paragraph (3) at the end thereof as follows:

"(3) No license may be granted for any project subject to the provisions of this Act unless the applicant complies with all procedural and substantive requirements of the laws of the State or States in which the project is located with respect to the acquisition of water rights and administration of the use of water. Any such license shall be subject to the applicant ob-

taining any water rights needed for such project in accordance with such requirements.".

SEC. 2. Section 27 of the Federal Power Act is amended—

(1) by deleting "used in irrigation or for municipal or other uses"; and

(2) by deleting "therein." and inserting in lieu thereof "therein; and no license granted pursuant to this Act shall relieve any licensee or applicant for a license from complying with all procedural and substantive requirements of the laws of the State in which the project is located with respect to any water rights needed for such project, including any terms, conditions, limitations, or other restrictions attached to such rights. Nothing in this Act nor in any other Act may be construed to constitute a preemption or intent to preempt the procedural and substantive requirements of State law with respect to the acquisition of water rights and administration of the use of water or with respect to any terms, conditions, limitations, or other restrictions which a State may attach to any such water rights for such project.".

Senator BRADLEY. We are privileged to be joined today by some of the Nation's leading authorities on hydroelectric power regulation and water law. I hope that all of you will help the subcommittee understand the hard issues raised by the *Rock Creek* decision and the issues that are framed by S. 106. I personally look forward to your testimony, and I have no more opening comments.

Senator Craig.

STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Senator CRAIG. Mr. Chairman, at the outset let me thank you very much for taking the interest you have in this legislation and agreeing to this hearing and to begin to address what you have so clearly outlined as an extremely important and serious issue.

I will, for the sake of the record and because of the technical nature of some of the issues we are dealing with, Mr. Chairman, largely stay in text with the comments that I have prepared for the record, because I think it is important that several points be made.

Before the hearing commences, though, I would like to lay to rest some fears that opponents of the measure have expressed to me and are now beginning to express publicly. The Federal regulators' lust for central power and preemption of State water rights I think can best be addressed by Justice Douglas' dissent in the *Pelton Dam* decision.

He stated that: "Federal officials have long sought that authority. It has been consistently denied them" throughout the history of this country. He says: "We should deny it again." Unfortunately, Justice Douglas was speaking in dissent. Enactment of S. 106 will accomplish his desire.

The industry seems concerned that a dual system will not work. I believe the experience in Idaho and other Western States lays to rest that fear. Idaho Power is Idaho's major hydro utility, Mr. Chairman, and they have uniformly obtained a water right from the State of Idaho and have managed to function reasonably well with this water right subordinated to other beneficial uses.

It probably will come as a shock to FERC that the State of Idaho does know how to manage its water and to balance its competing uses. As much as I would like to return to square 1 with this legislation, however, it is not my intent to reopen existing licenses. The law unfortunately is what the Supreme Court said it is and the legislation should be viewed as prospective.

I do not want that comment to suggest, however, that where projects have previously obtained water rights under State law, the restrictions attached to those rights would be waived. I only mean to suggest that, whatever the current status is presently of licensed projects, that status should remain.

Some environmental groups seem to have a concern that States will be less sensitive than FERC. I would ask them to reexamine that concept and ask themselves whether the trout in California are better off for the *Rock Creek* decision or whether the anadromous fish in Oregon are better off for the *Pelton Dam* decision.

This legislation does not centralize power in States, nor does it undermine the balancing test undertaken by FERC. It means that

the more restrictive condition, either by FERC or the State, will apply, or there will simply be no project.

There seems also to be an attempt by some to suggest that this legislation is designed to undermine Indian reserved water rights. That simply is false. I would remind my colleagues that a Federal reserved water right is simply an appropriation of State water rights which are not subject to definitions of beneficial use and are not subject to loss through nonuse.

They have a priority date and are administered by the States together with all other State water rights. To the extent a tribe has a reserved or adjudicated right for hydro development, then they have a right. It is as simple as that.

If, however, a tribe wishes to apply for a FERC license and does not have a water right, then they will have to comply with State law, like any other developer. There is nothing in this measure which would interfere with the conditioning authority for use of tribal lands or any other infringement upon tribal authority, nor does this legislation in any way affect the United States' trust responsibility.

What this legislation seeks to undo is the arrogance, in my opinion, displayed by the FERC Horseshoe Bend license in Idaho. The Idaho water right secured for that project contains the standard subordination language required by State law. When Idaho requested that the subordination be formally made a condition of the license, FERC told the State to get lost.

What FERC decided was that, and I quote from their letter: "We can require the licensee to reasonably reduce the its use of water for generation if we"—and I would like to emphasize—"if we, after consideration of all aspects of the public interest, conclude that it would be in the public interest to accommodate such upstream diversions."

FERC thinks that it, not Idaho, will rule on every future upstream diversion from wells for irrigation to diversions for hospitals and other municipalities. That is the arrogance that this legislation would seek to end.

The West is not the East, Mr. Chairman. Water is a scarce commodity in my arid State of Idaho, as is true of all other arid Western States. The right to use water is decided by the appropriation doctrine, whereby our precious water is allocated as an ownership right.

We do not have the luxury of living in a world of abundant water, as happens most of the time in the East. Riparian water rights are designed to be applied to areas of water abundance. The systems that have evolved to allocate our scarce commodity under prior appropriation doctrine are complex and are best administered at the State level, not in a room in Washington, DC.

S. 106 will allow the balancing test that has been used historically to be made where the balance is best understood, and that is in the States that are affected by projects.

I would also remind my colleagues that the Supreme Court in its decision on *Rock Creek* invited the Congress to overturn *First Iowa* and its offspring. The Court noted that if this had been a case of first impression it would be a close question, but concluded that "Congress remains free"—it is interesting that they would say that

in their decision. I quote: that "Congress remains free to alter what we have done."

We should take the Court up on this kind invitation and enact the legislation which is before the committee today.

Mr. Chairman, that concludes my opening remarks. I would say, coupled with all of those kinds of issues that you and I and the Congress and the country are concerned about today, whether it be water allocation for endangered species, whether it be water allocation for human use, for the first time in the West we are beginning to see the phenomenal stresses of inadequate amounts of water.

In the State of California, for example, because of a period of drought, we have businesses for the first time in that State looking at business plans and making determinations that they might have to leave the State for inadequacies in the ability to obtain water.

As is true in my State and other States, there is nothing more important today than the appropriate allocation of water for the kinds of uses that we would expect in our State and for all of those needs that we deem necessary and appropriate here in Congress as it relates to wildlife and habitat and the environment in general.

But historically, and true today, we have as western States been a partner in the process, and it is that kind of partnership and balance that was largely affected, if not nearly destroyed, by the Supreme Court decision. I think that is why the Court largely in its decision remained relatively open-ended in suggesting to Congress that the Federal Power Act in their opinion, although they had to rule as they did, probably sought to maintain a balance, and if Congress so wished that balance to be retained that they would have to act accordingly.

I believe that S. 106 works to reestablish that balance and that partnership, if you will, where primacy as it relates to appropriation retains at the State level, which is fundamentally important.

Thank you, Mr. Chairman.

Senator BRADLEY. Thank you very much, Senator Craig.

Senator Burns, who is the ranking member on this subcommittee.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Thank you, Mr. Chairman, and thanks for holding this hearing.

My comments are brief, and I look forward to hearing from the witnesses who will be appearing today. I want you to write it down because we will give you a test on it, because I have three questions I wish to be addressed:

When the Bureau of Reclamation builds a Federal project, they obtain a State water right. Why shouldn't a private individual who seeks a FERC license also obtain a water right?

When this committee approved legislation for coal slurry pipelines, we specifically included a requirement that State law had to be complied with in the acquisition of water rights, including any limit on exportation. Why should an applicant for a Federal license, because of the impact on a navigable waterway or use of Federal lands, have any greater exemption?

And whatever the intent of Congress when it enacted section 27 of the Federal Power Act, what would be the problem with this legislation if it were prospective in application?

Those are the only three questions I have, and that is my opening statement. I am looking forward to hearing from the witnesses.

Thank you, Mr. Chairman.

Senator BRADLEY. Thank you very much, Senator Burns. As usually, you are right to the point. That is very helpful.

Senator Hatfield.

STATEMENT OF HON. MARK O. HATFIELD, U.S. SENATOR FROM OREGON

Senator HATFIELD. Mr. Chairman, I too am grateful for the hearing, and I commend the Senator from Idaho, Mr. Craig, for focusing on this question. And I call it a question because I get conflicting responses from various and sundry staff and experts as to precisely what this bill will and will not do.

I think the focus has tended to be on whether there would be preemptive rights by the Federal Government or by the State governments in terms of conflict or differences of opinion. At least in part the bill addresses that.

I only want to say for the record, and I would like my full statement included in the record as if given——

Senator BRADLEY. Your full statement will be in the record.

Senator HATFIELD. I would like to say that since the salmon question has been raised vis a vis the Columbia River and my effort to at least try to get a regional plan for restoration, as against waiting for the Federal bureaucracy, of which there are some 22 subcommittees and committees of the Congress and about eight Cabinet-level positions that could claim some jurisdiction over the question of the fish, to try to get this resolved within the region.

Mr. Chairman, let me say to you, the old days in the West when it was a battle of water and a question of whether Federal or local law should take preemptive status, that is really kind of only a by-product problem today. Let me say that when we adopted the Bonneville Power Act, we regionalized the resources of that Northwest.

The Northwest Power Act further regionalized those resources. The intertie with southern California broadened the regional impact. And now with driftnetting and the endangered species, we have internationalized.

So consequently, the simplistic old battles between feds and locals, I think, has greatly changed within the last few years. So I have tried to address some of the attendant problems to the fish and found this to be true.

Now, I just think we have to begin to see that the water issue is not now a strictly western issue, a Western States issue. I have often said it was not the six guns that won the West; it was water impoundment that won the West, made it livable, made it potential for great development, as has occurred.

But Mr. Chairman, you and I have discussed numbers of times about the Oglala, the largest aquifer through 13 Midwestern States of this country, and its dropping water table, the breadbasket of the world. And that has to be addressed.

We have talked about the Eastern Seaboard and Southern States, some cities with a 30-day water supply, the Pacific Southwest. I believe that we have to try to approach this from a national perspective as well as an international perspective, and for multiple resources, multiple uses, and not just strictly as water.

Now, one last point. For many years in our country we have talked about Indian tribes. They were an ethnic group, they were a people who lived on a reservation or they had great cultural heritage, and they were looked upon, so to speak, as another ethnic group, like the Irish in Boston or the Italian-Americans or the Japanese-Americans.

But Mr. Chairman, after Judge Belloni issued his court decision that the treaties that we made with the Indian tribes of the West were treaties to be observed, to be upheld, to be honored, it changed the whole dimension of our thinking. They were no longer an ethnic group living in eastern Oregon or someplace on a reservation. They are a nation.

Their treaty is as valid as any treaty we have with France or Japan or any other Nation of the world. And when you begin to look at the treaty rights that have been now validated by our own court system, we are dealing again with something of much more complexity, a greater dimension, that we no longer can just ignore in saying whether this is a Federal law preemption or a State law preemption on a single resource, water.

But I do think the Senator from Idaho has certainly triggered our thinking and should provide this committee with a great deal of value from our expert witnesses here today. And I want to thank you, Mr. Chairman, for calling the hearing.

[The prepared statement of Senator Hatfield follows:]

PREPARED STATEMENT OF HON. MARK O. HATFIELD, U.S. SENATOR FROM OREGON

Mr. Chairman, thank you for the opportunity to speak today regarding S. 106, a matter of vital importance to the Pacific Northwest and the nation. I am pleased to see several of my friends from the Pacific Northwest on the hearing schedule today and look forward to soliciting their views on this legislation.

First, Mr. Chairman, I want to stress to you the importance of hydroelectric development in the Pacific Northwest. The states of Oregon, Idaho, Washington, and Montana, and the nations of Canada and the Northwest Indian Tribes all enjoy the benefits of the Columbia River System. In the United States, hydropower comprises a significant percentage of the electricity generated—14%. However, in the Northwest, 62% of the electricity is produced from hydropower resources. This 62% is made up of 120 federal, private, and public hydro projects which exist on the Columbia River Hydro System.

If any region of this nation was ever dependent on a single, coordinated, interdependent source of electricity generation for power, it is the Pacific Northwest. Despite this dependency, a great many benefits have been afforded to our region as a result of the predominance of hydro power resources clean air, clean water, and relatively inexpensive electricity rates. The continued coordinated operation of this interdependent hydro system is essential to the economic and social stability of my region.

Not only is the Columbia River System a significant source of electricity for the Northwest, Mr. Chairman, but it is, and has been for centuries, a source of subsistence for the people of the region. My Native American friends in the Northwest have relied on the Columbia River Salmon for centuries. The many different species of Salmon roaming the Columbia River have provided, not only food, but a sense of culture and heritage for the Tribes of our region.

Today Mr. Chairman, at least one of these salmon species—the Snake River Sockeye—has been declared an endangered species. Additionally, two more species—Columbia River Coho and Chinook—are scheduled for listing under the National

Marine Fisheries Services' proposed rule this Friday, June 7th. Last fall, in an attempt to avert the overwhelming ramifications of lost power generation in our region due to the need to protect the salmon, I convened what has been termed the "Salmon Summit" to explore new ways to reduce the impacts of five separate listings under the Endangered Species Act while at the same time protecting our precious salmon resources.

The Salmon Summit has come to several areas of agreement on what should be done to help the salmon. Among them are efforts to increase water storage on the Snake River, and efforts to design a test to draw down one or more of the 4 lower Snake River Reservoirs to increase stream flows for migrating fish. These and other efforts on behalf of the salmon are highly dependent on a coordinated Columbia River System. I have reservations as to whether S. 106 would be conducive to the needs of this coordinated system.

Another major concern I have, Mr. Chairman, is the apparent lack of support for this legislation from most regional Northwest river-use interests. Some of the entities opposed to this legislation are: the Pacific Northwest Utilities Conference Committee; Bonneville Power Administration; all 120 operators of Oregon hydro projects; all utilities; Northwest Indian Tribes; and even the regional environmental organizations such as Oregon Rivers Council, the American Rivers Council, and the National Wildlife Federation.

I have yet another concern regarding this legislation. Upon review of the staff memoranda circulated yesterday, one thing is clear to me—staff is unclear about what exactly this legislation does. Therefore, placing the great trust in staff that I do, I am also uncertain as to the actual effects of this legislation. Because of the lack of consensus on the staff level and the opposition I am receiving from so many regional interests, I remain unclear as to the true effects of this legislation.

One thing is clear to me, however, Mr. Chairman—the need for a coordinated and smooth-running Columbia River System has never been more apparent than it is today. Over the past 25 years in the Senate, I have made it a priority to aid in the implementation of this coordinated Columbia River System through the development of the Northwest Power Act, and the creation of the Northwest Power Planning Council.

It is with these concerns in mind, Mr. Chairman, that I wish to express some of my inquiries regarding this legislation: Is it possible that downstream and/or upstream states on coordinated interstate or international river systems could be severely affected by a single state's actions regarding stream flows under this legislation? How will Indian treaties be affected by this legislation? How will the salmon recovery plans developed by the Salmon Summit be affected by this legislation?

Mr. Chairman, with all due respect, these are simply a few of the main questions and concerns I have regarding this legislation. Hopefully, some, if not all, of these areas can be clarified during this hearing process.

Senator BRADLEY. Thank you very much, Senator Hatfield, for that perspective. It is very helpful.

Let us begin. Our first panel consists of: Kevin Kelly, Director of Office of Electricity, Coal, Nuclear and Renewable Energy, Department of Energy; and William S. Scherman, General Counsel, Federal Energy Regulatory Commission.

Senator BURNS. Mr. Chairman, Senator Seymour has a statement that he would like entered in the record, with unanimous consent.

Senator BRADLEY. His statement will be entered in the record.

Senator BURNS. Thank you.

[The prepared statement of Senator Seymour follows:]

PREPARED STATEMENT OF HON. JOHN SEYMOUR, U.S. SENATOR FROM CALIFORNIA

Thank you Mr. Chairman for agreeing to hold this hearing on Senator Craig's S. 106, now commonly referred to as the Rock Creek bill. I am pleased that the subcommittee will have an opportunity to discuss this legislation.

The State of California has been at the forefront of efforts to increase the role of states in regulating water flows from federally licensed facilities. California, as with all other western states, feels that it should have some control over its waters even if they flow through facilities licensed by the Federal Energy Regulatory Commission (FERC).

I am a strong advocate of states rights, and that is why I am a cosponsor of S. 106. I believe that the State of California should have authority over the waters that flow through it.

That being said, I am concerned about adding another layer of governmental bureaucracy to the already cumbersome process of FERC licensing.

I also am sensitive to environmental concerns that decentralizing control over water flows from federally licensed projects may result in lower levels of overall environmental protection. In my State, clearly the opposite is true, and I believe that passage of S. 106 would only act to strengthen environmental protection in California.

Mr. Chairman, water is the life blood of the west. Its economy as well as its environment are totally dependent on it. We must therefore use great caution when addressing legislation that may have far-reaching impacts on its distribution. S. 106 has raised many important questions about the regulation of water and water projects in the west. I look forward to a lively debate on this issue.

Senator BRADLEY. Gentlemen, welcome to the subcommittee, and why do we not begin with Mr. Kelly and be followed by Mr. Scherman. If you can, limit your prepared comments to 10 minutes, and then we will like to provide a maximum amount for questions. We want to try to move through the hearing at a rather fair pace.

Mr. Kelly.

STATEMENT OF KEVIN A. KELLY, DIRECTOR, ELECTRICITY, COAL, NUCLEAR, AND RENEWABLE POLICY, OFFICE OF POLICY, PLANNING AND ANALYSIS, DEPARTMENT OF ENERGY, ACCOMPANIED BY PAUL CARRIER, POLICY ANALYST, OFFICE OF POLICY, PLANNING AND ANALYSIS

Mr. KELLY. Good afternoon, Mr. Chairman and members of the committee.

I am pleased to have the opportunity to present testimony concerning S. 106, a bill to amend the Federal Power Act. Appearing with me today is Mr. Paul Carrier of my office.

The Department of Energy opposes S. 106 because it would create the potential for significant adverse effects on the Nation's existing and future hydroelectric capacity. Specifically, S. 106 could prevent comprehensive water resource planning, disrupt efficient, integrated hydropower operations, lead to conflicting hydropower operating criteria, create regulatory delays and uncertainties for the hydropower industry, and needlessly reduce existing and future hydropower generating capacity.

I want to state clearly for the record that the administration supports the longstanding principle of State primacy in water allocation, distribution, and use, except in cases where national interests take precedence over the rights of the State.

We appreciate the concerns of the sponsors of S. 106 and want to assure the subcommittee that our opposition to this particular bill should not be construed as a departure from our respect for and support of State primacy.

Right now, States get to say who owns water and how much each owner gets to consume. FERC gets to say how hydro projects use water—projects which do not consume water, but rather pass it through.

The Federal Power Act now requires the FERC, not to allocate water rights, but to set operating conditions that best fit with a comprehensive plan for interstate commerce, water power development, fish and wildlife, irrigation, flood control, water supply,

recreation, effects on archaeological sites, and other beneficial public uses. And FERC must do this while taking into account the plans, concerns, and obligations of Federal, State, and local governments, as well as Indian tribes.

S. 106 would amend the Federal Power Act to overturn this long-standing and successful policy that was recently upheld in a unanimous Supreme Court decision. It would require an applicant for a FERC hydropower license to comply with any State laws on water rights and water uses as a condition for the FERC to grant the license.

This means that the States can set operating criteria that interfere with FERC's comprehensive planning obligations. Further, under S. 106 State authority over water rights for a licensed project is no longer limited to proprietary rights, but also to uses that merely pass the water through without consuming it.

S. 106 could cause significant adverse effects and we do not see a potential for significant offsetting benefits. Among the adverse effects are the following:

One, it could jeopardize existing projects. Subjecting existing hydropower projects to entirely new operating limitations, as S. 106 would allow, could have a severe impact on the Nation's hydroelectricity supplies and on the economy, and—if we were to replace these facilities with other power sources—impact on the environment as well.

Second, S. 106 would preclude comprehensive planning. FERC is required to ensure that a proposed hydropower project is consistent with a comprehensive plan for the waterway. In 1986 this comprehensive planning requirement was strengthened by the Congress when it passed the Electric Consumers Protection Act.

Since State water laws may not consider or be able to accommodate all these interests, State-mandated operating limitations under S. 106 could undermine the recently reaffirmed intent of the Congress to have the FERC balance these interests.

Three, S. 106 could undermine integrated operations. Typically, large hydropower projects within the same river basin operate as part of a coordinated system. Such a system can include both Federal and non-Federal hydropower projects and can encompass several States.

State-mandated operating limitations could decrease the efficiency of these integrated operations and lead to conflicts among States.

Four, S. 106 could impose conflicting regulations. Different State and FERC operating criteria could be in conflict so that meeting one requires violating the other, preventing the project from going forward. In effect, conflicting regulations under S. 106 could give States veto authority over project proposals designed to fit a comprehensive plan.

And five, S. 106 could cause delay and regulatory uncertainty. Under S. 106, the FERC must wait for all State actions and subsequent litigations to be completed before it can license a project. In licensing a new project, this could delay the construction and operation of new generating capacity, and for re-licensing this would delay project modifications to improve generation and enhance environmental benefits.

In conclusion, S. 106 is not compatible with the National Energy Strategy or with recent actions by the Senate Committee on Energy and Natural Resources. The committee included two important hydropower provisions, as recommended in the National Energy Strategy, in its markup of the National Energy Security Act, S. 341.

One provision would support State authority by removing FERC jurisdiction completely over small projects under 5 megawatts. This recognizes that small projects generally do not affect interstate commerce. Over half the new hydropower developments and two-thirds of all existing hydropower developments fall into this category.

Now, the flip-side of this policy is that the FERC should retain authority over water use for larger projects, because these are more likely to have interstate consequences. S. 106 would deny FERC this authority.

The second provision adopted by the committee would simplify the hydropower regulatory process and encourage responsible development of this important renewable energy resource. S. 341 would amend the Federal Power Act to require the FERC to coordinate a single consolidated review of each application by interested Federal and State agencies.

The FERC would have to use the results of the consolidated review in determining appropriate license terms and conditions. The policy objectives of S. 106 go in the opposite direction.

To sum up, both the National Energy Strategy and S. 341 recognize that the regulatory process is a barrier to the development of renewable hydropower resources. Rather than streamline hydropower regulation, S. 106 adds yet another layer of potentially conflicting hydropower regulation.

For these reasons, the Department of Energy must oppose S. 106. Thank you, Mr. Chairman.

[The prepared statement of Mr. Kelly follows:]

PREPARED STATEMENT OF KEVIN A. KELLY, DIRECTOR, ELECTRICITY, COAL, NUCLEAR, AND RENEWABLE POLICY, OFFICE OF POLICY, PLANNING AND ANALYSIS, DEPARTMENT OF ENERGY

Mr. Chairman and members of the Committee, I am pleased to have the opportunity to present testimony concerning S. 106, a bill to amend the Federal Power Act. The Department of Energy strongly opposes S. 106 because it would create the potential for significant adverse effects on the Nation's existing and future hydroelectric capacity. Specifically, S. 106 could prevent comprehensive water resource planning; disrupt efficient, integrated hydropower operations; lead to conflicting hydropower operating criteria; create regulatory delays and uncertainty for the hydropower industry; and needlessly reduce existing and future hydropower generating capacity.

I want to state clearly for the record that the Administration supports the long-standing principle of state primacy in water allocation, distribution and use, except in cases where National interests take precedence over the rights of a state. We appreciate the concerns of the sponsors of S. 106, and want to assure the Subcommittee that our opposition to this particular bill should not be construed as a departure from our respect for and support of state primacy.

BACKGROUND

This bill seeks to overturn a unanimous Supreme Court decision in *California* v. *FERC* [1] ("the *Rock Creek* case"). To understand the impact of this proposed legislation on hydropower, it is helpful to review briefly the *Rock Creek* case.

In 1983, the Federal Energy Regulatory Commission (FERC) issued a license for the Rock Creek Hydroelectric Project in California and set a temporary minimum rate for water flow in the part of the creek bypassed by the project. The FERC required the licensee to conduct additional studies to determine a permanent minimum flow that would balance environmental and power generation concerns. The California Water Resources Board then issued a water rights permit with a minimum flow the same as in the FERC license.

When the studies were completed, both California and the FERC reviewed the results. in addition, the FERC consulted with appropriate Federal and State resource agencies and prepared an environmental assessment as required by the National Environmental Policy Act. The FERC also reviewed the flows in light of section 10(a) of the Federal Power Act, which requires that the project be best adapted to a comprehensive plan for interstate commerce, waterpower development, fish and wildlife, irrigation, flood control, water supply, recreation, and other beneficial public uses. As a result, the FERC increased the minimum flow rate and made it permanent. California considered a draft order with a permanent minimum flow rate significantly higher than the one in the FERC license. This means that more water would remain in the creek and less would be available for generating electricity. The Rock Creek licensee asked the FERC to declare exclusive jurisdiction to determine the project's minimum flow.

The FERC issued a declaratory order directing the licensee to comply with the minimum flow requirement of the Federal license. The FERC reasoned in its order that setting the minimum flow requirement is an essential part of fulfilling its mandate for comprehensive planning of hydro projects under the Federal Power Act. Having a State set different operating criteria would prevent the FERC from attaining a proper balance of these competing uses of the waterway. This would be inconsistent with some 10 years of policy under the Federal Power Act and its predecessor legislation.

California asked the FERC to rehear the case. The FERC issued an order denying rehearing and reaffirming its original decision. Subsequently, the U.S. Court of Appeals and the Supreme Court, in 1990, affirmed FERC's order denying rehearing.

In affirming FERC's order, the Supreme Court relied on its decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*,[2] interpreting the Federal Power Act. In *First Iowa*, the Court found that the Federal Power Act preserves State authorities relating to the control, appropriation, use, or distribution of water for irrigation, for municipal use, or "other uses of the same nature." The Court emphasized that these State authorities apply to proprietary water rights. This is widely understood to mean that States determine who owns water, and how much each owner can consume, but that the FERC rules on use by hydropower projects, which do not consume water, but rather pass it through.

The *Rock Creek* decision reaffirmed this long-standing policy. The decision does not take any authority away from the States. It does not give the FERC any additional authority. It merely reaffirms the policy that has been law since 1920, when Congress passed the Federal Waterpower Act, which was incorporated into the Federal Power Act in 1935.

There are two key features of this policy. First, States may not interfere with the FERC's comprehensive planning by setting hydropower operating limitations such as a minimum flow requirement. Second, the FERC may not interfere with proprietary water rights that have been allocated by the States. As *Rock Creek* affirms, States can continue to allocate water rights for irrigation, municipal water use, and other similar uses as they always have.

S. 106

S. 106 would amend the Federal Power Act to overturn this long-standing and successful policy. It would require an applicant for an FERC hydropower license to comply with any and all State laws on water rights and water uses as a condition for the FERC to grant the license. This means that the States can set operating conditions that interfere with FERC's comprehensive planning. Further, under S. 106,

[1] 110 S.Ct. 2024 (1990).
[2] 66 S.Ct. 906 (1946).

State authority over water rights for a FERC-licensed project is no longer limited to proprietary rights.

NEGATIVE EFFECTS OF S. 106

S. 106 could cause significant adverse effects. We do not see a potential for significant offsetting benefits. Among these adverse effects are the following:

1. *Jeopardize Existing Projects*—For the past 70 years the FERC and its predecessor agency have set operating criteria for non-Federal hydropower development. The FERC regulates a total of approximately 40,000 megawatts of conventional hydropower generating capacity, which supplies approximately 5 percent of the Nation's electrical energy. Subjecting these hydropower projects to entirely new operating limitations, as S. 106 would allow, could have a severe impact on the Nation's electricity supplies, the economy; and—if we have to replace these facilities with other power sources—the environment.

2. *Preclude Comprehensive Planning*—As mentioned earlier, the FERC is required to ensure that a proposed hydropower project is consistent with a comprehensive plan for the waterway. When the FERC issues a license, it must take account of concerns as diverse as flood control, navigation, fish and wildlife protection, irrigation, municipal water supplies, archaeological sites, recreation, power generation, the concerns and obligations of Federal, State and local governments, and Indian tribes. In 1986, this comprehensive planning requirement was strengthened by the Congress when it passed the Electric Consumers Protection Act. Since State water laws may not consider or be able to accommodate all these interests, State-mandated operating limitations under S. 106 could undermine the recently reaffirmed intent of Congress to have the FERC balance these interests.

3. *Undermine Integrated Operations*—Typically, large hydropower projects within the same river basin operate as part of a coordinated system. Each project is operated for the common good to maximize the sum of all beneficial uses of the waterway. Such a system can include both Federal and non-Federal hydropower projects and can encompass several States. The system's hydropower operations affect interstate commerce and are appropriately regulated at the Federal level. Having State-mandated operating limitations could decrease the efficiency of these integrated operations and lead to conflicts among the States.

4. *Impose Conflicting Regulations*—Because State water rights laws may not consider all the resource uses covered under the Federal Power Act, State and FERC operating criteria may differ. S. 106 would force hydropower developers to comply with the more restrictive operating limitations. There will be a corresponding loss of project energy and increases in project costs and electricity prices. State operating limitations could turn an economical project into an uneconomical one. Different State and FERC operating criteria could be in conflict, so that meeting one requires violating the other, preventing the project from going forward at all. In affect, conflicting regulations under S. 106 would give States veto authority over project proposals.

5. *Cause Delay and Regulatory Uncertainty*—Requiring compliance with all applicable State water rights laws prior to FERC licensing could cause additional regulatory delays. Unlike the current policy, in which the State water rights for hydropower projects are not a prerequisite for the FERC license, under S. 106 the developer must first obtain water rights from the State, with whatever conditions the State chooses to impose, before the FERC can grant the license. The FERC must wait for all State actions and litigation to be completed before it can license a project. In licensing a new project, this could delay the construction and operation of new generating capacity. In relicensing, this would delay project modifications to improve generation and enhance environmental benefits. Further, the introduction of these additional regulatory steps increases regulatory uncertainty and could discourage developers from making hydropower investments.

CONCLUSION

S. 106 is not compatible with the National Energy Strategy (NES) or with recent actions by the Senate Committee on Energy and Natural Resources. The Committee has included two important hydropower provisions in its markup of the National Energy Security Act (S. 341).

One would remove FERC jurisdiction over small projects under five megawatts. This recognizes that small projects generally do not affect interstate commerce and should be subject to State regulation. Over half the new hydropower developments fall into this category. The "flip-side" of this policy is that the FERC should retain

authority over water use for larger projects because these are more likely to have interstate consequences. S. 106 would deny the FERC this authority.

The second provision adopted by the Committee would simplify the hydropower regulatory process to encourage responsible development of an important renewable energy resource. S. 341 amends the Federal Power Act to require the FERC to coordinate a single, consolidated review by interested Federal and State agencies of each application. The FERC would have to use results of the consolidated review in determining appropriate license terms and conditions. The policy in S. 106 goes in the opposite direction.

To sum up, both the NES and S. 341 recognize that the regulatory process is a barrier to the development of renewable hydropower resources. Rather than streamline hydropower regulation, S. 106 adds yet another layer of potentially conflicting hydropower regulation. For that reason, the Department of Energy strongly opposes S. 106.

Senator BRADLEY. Thank you very much, Mr. Kelly.

Mr. Scherman.

STATEMENT OF WILLIAM S. SCHERMAN, GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION, ACCOMPANIED BY FRED SPRINGER, DIRECTOR, OFFICE OF HYDROPOWER LICENSING

Mr. SCHERMAN. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here today to discuss S. 106.

With me is Fred Springer, Director of the Commission's Office of Hydropower Licensing. We are here today as staff witnesses and do not speak for members of the Commission.

As you know, the Commission regulates the development of non-Federal hydroelectric projects that are subject to the Congress' commerce clause and property clause jurisdiction. These projects comprise about half of the Nation's developed hydropower capacity. Overall, hydroelectric projects supply about 10 percent of the electric energy generated in the United States.

We recognize that the *Rock Creek* decision, which confirmed long-standing precedent, has caused considerable concern, particularly in the Western States, because of the perceived effect of this decision on western water rights and the relationship between the Federal and State Governments. Mr. Chairman, Senator Craig, let me state at the outset that we are extremely sensitive to the States' concerns.

Indeed, through the Commission's hydro outreach program, which Mr. Springer administers, and participation in other water rights forums, we attempt to learn and be educated as much as possible about water-related concerns. To further that progress, Chairman Allday of the Commission has recently invited the Chairman of the Western Governors Association and the Chairman of the Western States Water Council to the Commission to, and I quote from his letter, "start a constructive dialogue concerning how the Commission can best meet its hydroelectric licensing obligations under the Federal Power Act in the context of and with sensitivity to water management issues in the Western States."

The *Rock Creek* decision did nothing more than affirm the *First Iowa* case of 1946 and, contrary to some of the publicity regarding *Rock Creek*, there has been no change in the last four decades in how the Commission treats water rights issues. Although the Commission has had occasion to issue a number of orders in the 1980's addressing water rights, its actions simply reflect the fact that li-

cense applications filed with the Commission increasingly come into actual or potential conflict with the alternative use demands placed on a finite water resource.

In dealing with these issues, we are guided by the Federal Power Act as amended by ECPA. The Commission may only license a project which in its judgment will be best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes.

This requires the Commission, when deciding whether and under what terms to license a project, to explore all issues relevant to the public interest. The Commission is required to balance what are sometimes competing uses of a waterway, including water power, protection and enhancement of fish and wildlife, irrigation, flood control, water supply, recreation, energy conservation, and preservation of environmental quality.

In order to make an informed decision regarding this balance, we depend in large part on the record that is provided in each case. To a large degree, the balancing and consideration of State water rights issues in the licensing process is dependent upon the value of the information we receive.

When Congress enacted ECPA in 1986, it emphasized that environmental values must receive equal consideration with development values, but it retained the Commission's authority to determine how ultimately to balance the various uses of the water.

As shown on Attachment A to my prepared testimony, the Commission's licensing process provides a minimum of six specific opportunities for States and other interested entities to make their concerns known. If an environmental impact statement is required, there are two additional opportunities as well.

Further, under ECPA the States have specific opportunities to participate in our process. For example, under 10(j) of the FPA the Commission has to include in licenses conditions to protect, mitigate damage to, and enhance fish and wildlife based upon the recommendations of State and Federal wildlife agencies, unless it finds the recommendations conflict with applicable law.

Since ECPA, nearly 90 percent of these agencies' fish and wildlife recommendations have been adopted by the Commission. Therefore, in our judgment under the existing statutory framework States have an important and effective role in the licensing process and a Federal forum for resolving water rights issues.

S. 106 would radically alter the existing regulatory framework in which hydroelectric projects are licensed and conditioned. The effect of the amendment would be to reverse *First Iowa* and *Rock Creek*. If enacted, the amendment would give States authority to determine all water usage associated with a project and to effectively veto hydropower projects.

In so doing, S. 106 would subject to State control not only the Commission's decisions about a project's use of the water, but also the recommendations and conditions promulgated by other Federal agencies which currently exercise important statutory roles in the licensing process.

Enactment of S. 106 would undermine the balancing requirements crafted by the Congress in the FPA as amended by ECPA. Depending on how the various States would implement their broad-

ened authority under S. 106, there is the very real potential to seriously undermine the comprehensive development of the Nation's waterways.

The proposed amendment would shift effective decisional authority from a Federal agency to each State agency in each State around the country. In addition, many hydro projects, as noted earlier, are a matter of concern to more than one State, projects that are located on waterways passing through two or more States or between States.

Senator BRADLEY. Mr. Scherman, you have about 2 minutes.

Mr. SCHERMAN. How a project is operated can affect the interests of other States, both downstream and upstream. Under current law, the FERC must act as a Federal arbitrator in resolving disputes between these States.

In summary, S. 106 if enacted would stifle the balanced development of a valuable energy option to meet growing energy needs and may disrupt the rational system of hydroelectric development which has benefited the Nation for the past 70 years.

Clearly, the competing demands on finite water resources, particularly in the West, are increasing and will generate conflicts between hydropower production and other beneficial uses. There is, however, under the existing regulatory framework an effective and a rational forum for resolving these difficult disputes.

As Chairman Allday's letter recently recognizes, improved communication and understanding may be needed for the States to effectively use that forum. But in our judgment, there is a strong national interest in retaining Federal jurisdiction to balance energy development, environmental protection, and other public uses of the Nation's waterways.

Thank you.

[The prepared statement of Mr. Scherman follows:]

PREPARED STATEMENT OF WILLIAM S. SCHERMAN, GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you to discuss S. 106, a bill to amend sections 9 and 27 of the Federal Power Act (FPA) to preclude the Federal Energy Regulatory Commission (Commission or FERC) from licensing a hydroelectric project unless the license applicant has complied with all State laws where the project is located with respect to the acquisition of water rights and administration of the use of water. With me today is Fred Springer, Director of the Commission's Office of Hydropower Licensing. We are here today as staff witnesses and do not speak for members of the Commission.

BACKGROUND

The Commission regulates the development of non-Federal hydroelectric projects that are subject to Congress' Commerce Clause and Property Clause jurisdiction, pursuant to sections 4(e) and 23(b)(1) of the Federal Power Act (FPA). These projects comprise about half of the nation's developed hydroelectric power capacity. Overall, hydroelectric projects supply about ten percent of the electric energy generated in the United States.

The Commission issues three forms of authorization with respect to hydroelectric development: preliminary permits, licenses, and exemptions from licensing. Permits establish a period of up to three years during which the holder may study the potential for development at a site, and give the holder the exclusive right to file a license application during the permit term. Original licenses are issued for terms of up to 50 years. Subsequent licenses for existing projects ("new licenses") are issued for terms from 30 to 50 years. Exemptions are a form of authorization issued in perpetuity and that apply to certain small projects at existing dams and to projects lo-

cated on manmade conduits. Exemption holders, unlike license holders, do not enjoy power of eminent domain.

The licensing process involves substantial participation by other federal and state agencies, Indian tribes and the public. This participation begins as long as three years prior to the filing of a license application, in the context of pre-filing consultation procedures established by the Commission's regulations. A copy of the license application is sent to each pertinent agency at the same time it is filed with the Commission. When an application is accepted for filing, public notification is published in the Federal Register and local newspapers. Copies of the notice are mailed directly to pertinent federal, state, and local agencies. Interested parties are permitted to intervene and raise issues or file protests. The Commission determines whether or not the proposed project is a major federal action requiring an environmental impact statement under the National Environmental Policy Act (NEPA), and prepares the appropriate NEPA document. Based on the NEPA document and all materials and comments in the record, the Commission prepares an order acting on the license application.

The regulatory climate for non-federal development of hydroelectric power has become increasingly complex, reflecting the many public interest issues that must be considered. A license from the Commission is not the only authorization required for jurisdictional projects, and state and other federal agencies have a substantial statutory role in the licensing process itself.

A prerequisite to a license is the issuance of water quality certification by the state in which the project discharge is located, pursuant to section 401 of the Federal Water Pollution Control Act (Clean Water Act). Most licensees must also receive a Clean Water Act Section 404 dredge and fill permit from the U.S. Army Corps of Engineers. Projects located on lands under the jurisdiction of federal land management agencies, such as the U.S. Forest Service and the Bureau of Land Management, must receive a right-of-way permit from the appropriate agency pursuant to section 7 of the Federal Land Policy and Management Act (FLPMA).

In addition to these other required authorizations, projects on federal reservations are subject to mandatory terms and conditions imposed by the administering agency pursuant to section 4(e) of the FPA. FPA Section 18 empowers the Secretaries of Commerce and the Interior to prescribe fishways at licensed projects. Section 30(c) of the FPA and Section 405(d) of the Public Utility Regulatory Policies Act of 1978 (PURPA) provide that exemptions from licensing are subject to mandatory conditioning by federal and state fish and wildlife agencies.

FPA PROVISIONS AND CASE LAW AFFECTING WATER RIGHTS

With respect to water rights, there are several provisions in the FPA which interact with and affect water acquisition and usage.

Under Section 10(a)(1) of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA), 16 U.S.C. § 803(A)(1), the Commission may only license projects which, in its judgment, will be best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes. This requires the Commission, when deciding whether and under what terms to license a project, to explore all issues relevant to the public interest. (*Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967).). The Commission is required to balance what are sometimes competing uses of a waterway, including water power development, protection and enhancement of fish and wildlife, irrigation, flood control, water supply, recreation, energy conservation, and preservation of environmental quality.

Review of the legislative history of the Federal Water Power Act of 1920, the predecessor to the FPA, reveals that the framers, in order to avoid the previous fragmented and piecemeal control over hydroelectric projects, intended to vest in one agency—the Commission—the exclusive authority to consider, balance and determine all public interest issues. When Congress enacted ECPA in 1986, it emphasized that environmental values must receive equal consideration with development values, but it retained the Commission's authority to determine how ultimately to balance the various uses of the waterway.

The original framers of the statutory scheme also included in the FPA Section 27, 16 U.S.C. § 821, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

They also provided in Section 9(b) of the FPA, 16 U.S.C. § 802(a), that the Commission could require license applicants to submit:

> Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

ECPA, enacted in 1986, did not alter Sections 27 or 9(b) of the FPA, except to renumber Section 9(b) as Section 9(a)(2).

The interpretation and interrelationship of Sections 27 and 9(b) with the Commission's licensing authority has been addressed in a series of cases beginning in 1946 and most recently in 1990. The first of these is the landmark United States Supreme Court decision in *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152 (1946).

In *First Iowa*, the Federal Power Commission (predecessor to the FERC) had dismissed a license application for a project to be located on a navigable river in the State of Iowa, because the applicant had not submitted evidence under Section 9(b) of the FPA that it had obtained a permit required under state law to construct the project. The court of appeals affirmed the Commission. However, the Supreme Court, after reviewing the relevant legislative history, reversed. The Supreme Court held that the FPA did not contemplate a dual system of duplicate state and federal permits and that the Commission's interpretation of the FPA would vest in the state a veto power over the project and could subordinate to the control of the state the comprehensive planning responsibilities Congress intended to vest in the Commission. The Court interpreted Section 9(b) as only requiring that an applicant present such evidence of compliance with state laws as, in the Commission's judgment, would be appropriate to effect the purposes of the federal license. With regard to Section 27, the Court interpreted that section as only protecting "proprietary" rights.

First Iowa's holdings regarding the scope of Section 9(b) and compliance with state law were followed by the United States Court of Appeals for the Ninth Circuit in *State of Washington, Department of Game* v. *FPC*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954). The court held that the licensee did not have to show compliance with the laws of the State of Washington, including a statute requiring it to obtain a permit for the diversion of water, prior to obtaining a Commission license. It held that state laws cannot prevent the Commission from issuing a license or bar a licensee from acting under its license to build a dam on a navigable stream.

In 1954, the Supreme Court in *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), clarified its *First Iowa* "proprietary" rights statement by holding that water rights, like other property rights taken by licensees, are compensable under the Federal Power Act.

The following year, the Supreme Court issued its *Pelton Dam* decision. (*FPC* v. *Oregon*, 349 U.S. 435 (1955).) The State of Oregon contended in that case that entities proposing to construct hydroelectric projects on lands constituting reservations of the United States had to obtain the permission of the states. The Court held that to allow the state to veto a project to be located on reserved lands by requiring the state's additional permission would result in the very duplication of regulatory control precluded by the *First Iowa* decision. Thus, the Court extended its *First Iowa* holding and rationale to projects to be located on reserved lands.

Two other relevant decisions are the Ninth Circuit's decisions in *Portland General Electric Co.* v. *FPC*, 328 F.2d 165 (9th Cir. 1964), and *State of California* v. *FPC*, 345 F.2d 917 (9th Cir. 1965). In the first case, the court stated that the only purpose of Section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another of a license granted by the Commission. The court held that that section did not stand in the way of the Commission imposing navigation conditions in a license that could interfere with the licensee's retention and exercise of its state-granted water rights. In the second case, the court applied the same rationale to conclude that the Commission had authority to impose conditions which could impair a licensee's full use of irrigation water rights in future years. The court stated that, if an applicant wants a license, it must accept the reasonable restrictions and obligations attached thereto by the Commission.

Most recently, in *California* v. *FERC*, 110 S.Ct. 2024 (1990) (*Rock Creek*), the Supreme Court declined to overturn the 44-year-old interpretation of FPA Sections 9(b) and 27 as set forth in *First Iowa*.

The Supreme Court's decision arose out of a post-licensing proceeding for a project on Rock Creek, in El Dorado County, California. At issue was the permanent minimum stream flow for the project. The California Department of Fish and Game recommended a minimum flow schedule to maximize protection of fishery resources. The licensee advocated a considerably lower minimum flow. The Commission set the matter for hearing before an administrative law judge, and the California Department participated actively as a party in the proceeding. The judge, after considering the evidence and the various expert witnesses' testimony, decided on a minimum stream flow between those recommended by the California Department and the licensee, that would preserve the pre-project fishery while ensuring the financial stability of the project. The Commission affirmed the judge's determination.

Meanwhile, California's State Water Resources Control Board initiated a proceeding to require, as a condition of the state water permit it had issued for the Rock Creek project, permanent minimum flow rates much higher then those approved by the Commission. In response to the licensee's petition for a declaratory order, the Commission issued an order asserting its preemptive authority to determine the minimum flow rate for the project.

California appealed. In its decision affirming the Commission's order, the Supreme Court stated that the case turned on the construction of Section 27 of the FPA, which preserves the vitality of state laws "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein." California argued that its determination of minimum flow requirements for Rock Creek was not preempted by the FPA, because Section 27 preserved the state's authority to regulate that aspect of water use in a licensed project. The Supreme Court, however, held that it had resolved this issue 44 years earlier in *First Iowa* when it construed Section 27 of the FPA as reserving to the states only matters of the "proprietary" rights to water, such as allocation and distribution of water for irrigation and consumption. The Court declined to overturn its *First Iowa* resolution of this issue. The Court concluded that:

> As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. . . . Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and [quoting from *First Iowa*] would "constitute a veto of the project that was approved and licensed by FERC."

STATE/FEDERAL CONCERNS

The *Rock Creek* decision has caused considerable concern, particularly in the western states, because of the perceived effect of this decision on western water rights and the relationship between the Federal government and the States. We are extremely sensitive to the States' concerns. Indeed, through the Commission hydro outreach program, and participation in other water rights forums, we attempt to learn as much as possible about water-related concerns. Toward that end, Chairman Allday just recently invited the Chairman of the Western Governors Association and the Chairman of the Western States Water Council to the Commission "to start a constructive dialogue concerning how the Commission can best meet its hydroelectric licensing obligations under the Federal Power Act in the context of, and with sensitivity to, water management issues in the Western States." (See Attachment B.)

It must be emphasized that the *Rock Creek* decision did nothing more than affirm the Court's 1946 decision in *First Iowa*. We would also note that, contrary to some of the publicity regarding *Rock Creek*, there has been no change in the last four decades in how the Commission treats water rights issues. Although the Commission had occasion to issue a number of orders in the 1980's addressing subordination and other water rights issues, its actions simply reflect the fact that the license applications filed with the Commission increasingly came into actual or potential conflict with alternative use demands placed on finite water resources.

There are three general types of situations which raise issues involving water rights in the licensing context. First, there are those cases where the license applicant opposes a condition (for example, a minimum flow requirement for protection

of fishery resources) that would detract from the licensee's use of water rights to generate electricity. Conditions pertaining to fish and wildlife are based on recommendations of State and Federal fish and wildlife agencies, and the Commission must accept such recommended conditions unless they are found to be inconsistent with the purposes of the FPA and any inconsistency cannot be resolved. In addition, in meeting its Section 10(a) responsibility to ensure comprehensive development of a waterway, the Commission may impose conditions necessary to balance all beneficial uses of the waterway, including fish and wildlife, irrigation, flood control, water supply and recreation. As noted, in return for obtaining the privilege of using a national resource to generate hydroelectric power, the licensee must accept reasonable conditions placed on such privilege for the benefit of the public interest.

Second, there are situations where the state's grant of the water rights needed for a hydroelectric project to someone other than the license applicant is urged as grounds for denial of the license applicant's proposal. Were this argument to prevail, the Commission would lose to the states the ability to determine whether the overall public interest favors development of the project or retention of the water rights by the existing holder, and to provide for a comprehensive plan of development for the waterway. It should be noted that Section 21 of the FPA empowers a licensee who cannot acquire the necessary water rights by purchase or agreement to acquire them by eminent domain upon payment of appropriate compensation. Although such eminent domain proceedings can be brought in either federal district court or state court, state law will be used for determining the amount of compensation. *Georgia Power Co.* v. *Sanders*, 617 F.2d 1112 (5th Cir. 1980), *cert. denied*, 450 U.S. 936 (1981).

Third, there are situations where the Commission is urged to condition the license to require the licensee to subordinate its water rights for the operation of the project to competing uses of such water, such as increases in upstream irrigation needs.

A central part of the Commission's responsibility under the FPA is to ensure that a licensed project's use of the waterway is consistent with a comprehensive plan that reflects an appropriate balancing of all the various uses of the waterway in the public interest. Accordingly, the Commission will subordinate a licensee's use of water for project purposes to competing uses if it determines, when it issues a license or pursuant to authority reserved in the license, that such subordination would be in the public interest.

However, in order to make informed decisions regarding how to balance the varying demands on water that the licensee wishes to use for project purposes, and in order to comply with the requirement of Section 313(b) of the FPA, 16 U.S.C. § 8251(b), that its decisions be based on substantial evidence, the Commission must have a complete record on which to make its decisions. It simply cannot issue a "blank check" for the diversion of water from projects licensed under the FPA. As shown on Attachment A, the Commission's licensing process provides a minimum of six specific opportunities for states and other interested entities to make their concerns known. If an environmental impact statement is required, there are two additional opportunities.

There is no doubt that states have legitimate concerns and can offer valuable expertise regarding the balancing of competing water uses in the licensing context. And indeed ECPA has enhanced the states' role. Section 10(a)(2)(A) of the FPA requires the Commission's licensing decisions to consider a proposed project's consistency with state comprehensive plans for improving, developing, or conserving waterways that could be affected by the projects. The vast majority of licenses issued since ECPA are consistent with such state plans. Section 10(a)(2)(B) of the FPA also requires the Commission's licensing decisions to consider the recommendations of state agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the state in which the project is located. Furthermore, Section 10(j) of the FPA requires the Commission to include in licenses conditions to protect, mitigate damages to, and enhance fish and wildlife, based on the recommendations of state and federal fish and wildlife agencies, unless it finds the recommendation conflicts with applicable law. Nearly 90 percent of these agencies' fish and wildlife recommendations are adopted. Under the existing statutory framework, therefore, the states have an important and effective role in the licensing process and a federal forum for resolving water use issues.

S. 106 PROPOSED CHANGES

S. 106 would radically alter the existing regulatory framework in which hydroelectric projects are licensed and conditioned. It would amend Section 9(a) to pre-

clude the Commission from issuing a license unless the applicant complies with all procedural and substantive requirements of the state or states in which the project is located with respect to the acquisition of water rights and administration of the use of water. A license would be subject to the applicant obtaining any water rights needed for such project in accordance with State requirements. It would also amend Section 27 to provide that no license granted under the FPA shall relieve the licensee from complying with all procedural and substantive requirements of the state in which the project is located with respect to any water rights needed for the project, including any terms, conditions, limitations, or other restrictions attached to such rights. It further provides that nothing in the Act preempts the procedural and substantive requirements of state law with respect to the acquisition of water rights and administration of the use of water or with respect to any terms, conditions, etc. which a State may attach to water rights for a project.

The effect of the amendments would be to reverse *First Iowa* and *Rock Creek*. If enacted, the amendments would give states authority to determine all water usage associated with a project and to effectively veto hydropower projects. In so doing, S. 106 would subject to state control not only the Commission's decisions about a project's use of water, but also the recommendations and conditions promulgated by other federal agencies which currently exercise important statutory roles in the licensing process. Indeed, as the Supreme Court recognized in the *Rock Creek* opinion, "[b]y directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role." (109 L.Ed at 486-487.) Thus, enactment of S. 106 would undermine the carefully crafted balancing requirements Congress enacted in ECPA.

Depending on how the various states would implement their broadened authority under S. 106, there is the very real potential to seriously undermine the comprehensive development of the nation's waterways which Congress directed in Section 10(a) of the FPA, and the balancing of public interest factors by the Commission. The proposed amendments would shift effective decisional authority from a federal agency to each state agency in each state around the country.

In exercising their authority, state agencies may employ differing standards reflecting the emphasis that different states place on particular values. In *Rock Creek*, California placed a particularly strong emphasis on fishery resources, but other states may emphasize power development or other uses of water. In other words, some projects that the Commission might find, on balance, to be beneficial to the national interest might be rendered uneconomic by water flow requirements imposed by some state agencies, while other state agencies might mandate stream flows that the Commission would regard as disproportionately harmful to environmental values in relation to their economic benefits.

Furthermore, many hydroelectric projects are a matter of concern to more than one state. Many projects are located on waterways passing through two or more states, or that form borders between states. Also, how a project in one state is operated can affect the interests of other states both downstream and upstream.

For instance, the reservoir of a project chiefly located in one state can extend into another state, inundating land and affecting recreation and fish and wildlife resources related to the formerly free-flowing portion of the waterway. The ability of a project in one state to generate power or meet flow release conditions for the protection of fish and wildlife may be affected by the operation of an upstream project in another state. Anadromous fish use rivers often flowing through several states. Those states may disagree about what measures are appropriate to protect or enhance that resource in light of other public interest considerations, such as need for power and irrigation. Under current law, the Commission must act as a federal arbiter in resolving these disputes.

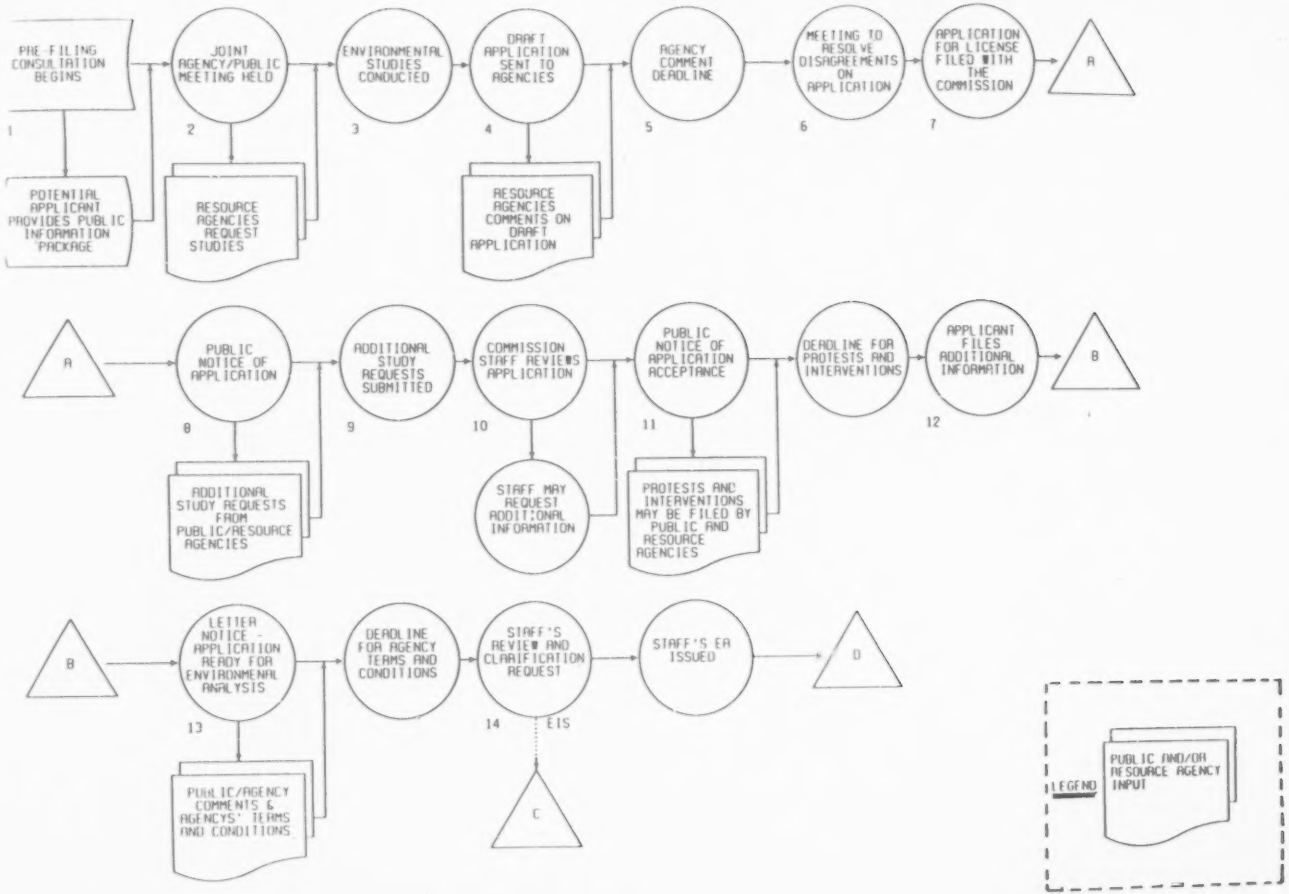
S. 106 would also affect the federal regulatory scheme of permittee, municipal, and existing licensee preferences, in that states would control which applicant obtains the necessary water rights.

In summary, S. 106 if enacted will stifle the balanced development of a valuable energy option to meet growing energy needs and will disrupt—if not send into chaos—the rational system of hydroelectric development which has benefited the nation for the past 70 years. Clearly, the competing demands on finite water resources, particularly in the West, are increasing and will generate conflicts between hydropower production and other beneficial uses. There is however under the existing regulatory framework a federal forum for resolving these difficult issues as they arise with respect to licensed hydropower projects. As Chairman Allday's recent

letter recognizes, improved communication and understanding may be needed for states to more effectively use that forum. But, in our judgment, there is a strong national interest in retaining federal jurisdiction to balance energy development, environmental protection, and other public uses of the Nation's waters. We strongly urge the Congress not to undermine that important National interest by enacting S. 106.

ATTACHMENT A

LICENSING PROCESS



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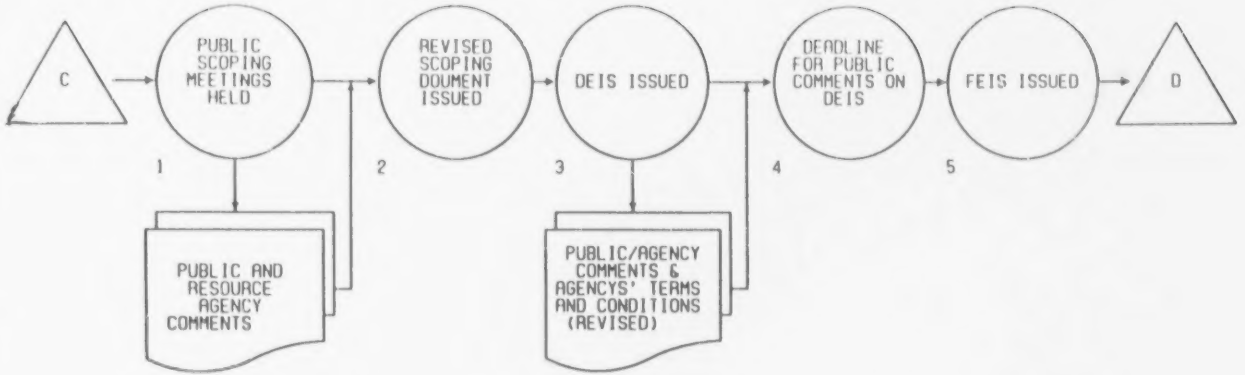
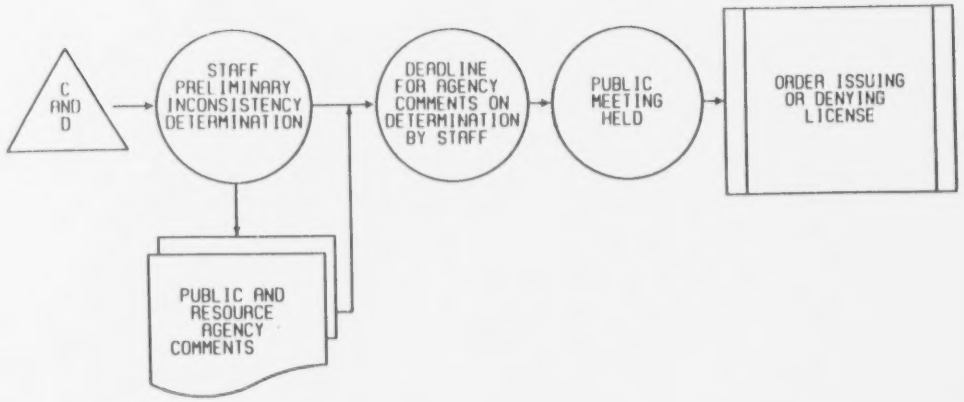

C
PUBLIC SCOPING MEETINGS HELD
REVISED SCOPING DOUMENT ISSUED
DEIS ISSUED
DEADLINE FOR PUBLIC COMMENTS ON DEIS
FEIS ISSUED
D
1
2
3
4
5
PUBLIC AND RESOURCE AGENCY COMMENTS
PUBLIC/AGENCY COMMENTS & AGENCYS' TERMS AND CONDITIONS (REVISED)

10(J) PROCESS


C AND D
STAFF PRELIMINARY INCONSISTENCY DETERMINATION
DEADLINE FOR AGENCY COMMENTS ON DETERMINATION BY STAFF
PUBLIC MEETING HELD
ORDER ISSUING OR DENYING LICENSE
PUBLIC AND RESOURCE AGENCY COMMENTS

[Attachment B]

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, May 31, 1991.

HON. GEORGE NICKELSON,
Governor of South Dakota, Chairman, Western Governors Association, Denver, CO.
HON. WILLIAM H. YOUNG,
Chairman, Western States Water Council, Midvale, UT.

DEAR GOVERNOR MICKELSON AND MR. YOUNG: I want to thank you once again for inviting the Commission to participate in the May 1991 water management workshop in Park City, Utah, sponsored by the Western Governors Association and the Western States Water Council. The Commission's Director of the Office of Hydropower Licensing, Mr. Fred Springer, believes that the workshop was extremely helpful and provided new perspectives on the problems of western water users and the need to consider and integrate changing public values in water management. The states' representatives seemed to share a sense of urgency and willingness to take a fresh look at these problems.

I share this sense of urgency. This is an appropriate time to start a constructive dialogue concerning how the Commission can best meet its hydroelectric licensing obligations under the Federal Power Act in the context of, and with sensitivity to, water management issues in the western states.

Establishing a new working relationship between the Commission and the western States where hydroelectric licensing is concerned is extremely timely. As your discussions in Park City show, there is a great deal of ongoing discussion and debate regarding the roles of the Commission and the states in hydroelectric licensing. Starting such a dialogue now can significantly help and hopefully inform this process.

If you agree with me that this would be an opportune time to begin a dialogue on these issues, please contact me or Mr. Springer to arrange a meeting between our relevant staff members. We would be happy to host such a meeting here at the FERC.

I look forward to your early reply.

Yours truly,

MARTIN L. ALLDAY, *Chairman.*

Senator BRADLEY. Thank you very much, Mr. Scherman.

Senator Craig.

Senator CRAIG. Mr. Chairman, thank you.

Let me ask, for sake of time, because we have a——

Senator BRADLEY. If you would yield, what I would like to do is to limit questions to 5 minutes a Senator.

Senator CRAIG. I would ask unanimous consent that, for the record, I will submit others for purposes of filling the record, because I think there are so many issues here that need to be discussed.

First of all, let me thank all of you for coming. I never question the sincerity of your testimony. I might differ with it and probably will today as it relates to Federal versus State authority.

Mr. Kelly, you have testified that State water law may not consider the kinds of diverse concerns that FERC takes into account when it issues a license. Is it reasonable to think, though, that possibly there are concerns that States have that FERC does not, nor is it required to, take into consideration when it issues a license?

Mr. KELLY. Well, insofar as FERC is required to consider a balancing of all interests, including State interests, FERC's scope of interest, if anything, is more inclusive than the States, but should include all the States' interests. I think it is likely that they may place different weights, FERC and States, on things.

In thinking this problem through in the National Energy Strategy, we wrestled with something very similar and concluded that where you have big projects they were more likely to have larger

interests over a larger region. They are going to affect more than one State. They are going to affect national interests with regard to agriculture, the environment, fish and wildlife, especially in the case where rivers flow into other rivers that flow through other States before they make it to the ocean.

So we concluded that a fairly simpleminded, but perhaps effective, way of dividing authority was to say that if you have a really big project it is probably going to have multiple State interests and some larger national interest, and that FERC should continue to do the balancing it has been authorized to do since 1986. Where you have a small project, which is more likely to have its interests confined within the borders of the State, jurisdiction over that small project should be taken away from FERC completely and given over to the States. Two-thirds of the existing licensed developments would fall into that latter category.

Senator CRAIG. Congress also has the power to override State law and mandate a project. We have declined to do so in the instance of the Bureau of Reclamation. Why is FERC, if you will, so much more enlightened? Or is it simply that you dislike in this instance sharing power with other elected officials?

Why the unique difference here?

Mr. KELLY. Well, as I understand it, in the case of Reclamation their primary function is to create a dam to provide water for irrigation.

Senator CRAIG. Historically, yes.

Mr. KELLY. And the hydropower was considered a secondary benefit. And since the use of water for irrigation is a consumptive use, the Federal Government has always recognized that State authority over the consumptive uses of water is primary.

But in the case of the FERC, they are licensing a project that takes water that is not being used consumptively and allow it to pass through a facility for generating power, not to be consumed, but to exist for other uses after it passes through. FERC, when it licenses a project and says so much water should be available to pass through, should be able to enforce the conditions of that license and not have the State later put it at risk by threatening to take that water away.

Senator CRAIG. If that is true, and you obviously say it and believe it is true, why then in the instance of the license I mentioned in my testimony, did FERC say, we will decide the differences of consumptive use? And their letter clearly spells that out in the *Horseshoe Bend* case. Not pass through at all, but they said, we will decide whether you divert water for a municipal purpose or whether you use it for some other purpose.

In other words, they are deciding that they can rule absolute. I believe that to be different from the position you just stated.

Mr. KELLY. The *Horseshoe Bend* case, as I understand it, was before 1986, when the Congress amended the Federal Power Act to require the FERC to take into account a much broader range of things than they may have taken into account previously, including the comprehensive State plans for future development of a river basin.

So that it may be the case that the *Horseshoe Bend* decision, decided before ECPA was passed, would be different if decided today from what it was then.

Senator CRAIG. The problem is it may be, but it is not. The letter is dated 1988. The response from FERC is 1988.

Thank you.

Mr. Scherman, a question of you. When you talk about the Federal Power Act having the responsibility of balance—I think those were the terms you used in your testimony—that under that you had the responsibility of balance. What you are saying is you have the responsibility of balance only as you see it, is that not correct?

Is that not what the law vis a vis the court decision really says? Prior to that court decision, there was in fact a balance between the ability of the State and FERC to work together in the creation of it.

Mr. SCHERMAN. Senator Craig, I do not think the *Rock Creek* decision changed the law. I think that law had been established in 1946 in the *First Iowa* case. And I will agree with you that the responsibilities that Congress has given to the Commission in balancing the various competing uses of the water do require the Commission to make some evaluation and use criteria upon which to make determinations.

What I think is important and I think, going back to your earlier question, the Commission has under its licensing scheme—the States have a number of, I think at least six, opportunities to make their views known to the Commission. The value of their information in large part determines how much weight the concerns they raise is given in the licensing process.

In the *Horseshoe Bend* case, for example, just to name one, in the Commission's judgment the requested subordination provision which you referred to, the Commission did not believe on balance that the evidence demonstrated at that point in time that that provision was appropriate.

There was another provision in the license which the Commission referred to in its order, article 12, which is a licensing condition, that enabled the State to come back in later on and say: Here is the evidence as to what has happened in our State and we would like a modification of the license.

So I think the *Horseshoe Bend* case does not stand for the proposition that we were not concerned about that issue. I think it stands for the proposition that, based upon the record, which is all we have to go on in these cases, the evidence did not demonstrate that at that particular time that condition was appropriate.

Senator CRAIG. Thank you.

Senator BRADLEY. Thank you very much, Senator Craig.

Senator Burns.

Senator BURNS. I guess I am going to ask the same three questions. Did you write them down?

Mr. KELLY. Yes, I did.

Senator BURNS. Good. Can I hear the answers?

You have testified that State water laws may not consider the diverse concerns which FERC takes into account when it issues a license. Could that also be true that State laws make the same considerations, but establish different priorities?

Mr. KELLY. I think that is correct. State laws could establish different priorities.

Senator BURNS. I guess what I am getting at, I have the same concerns and I also have some concerns that Senator Craig has, if you would explain to me, what is wrong with the State having veto power over a hydro project in its borders? What is wrong with that?

Mr. KELLY. Well, I am not convinced, Senator—I do not necessarily know all the laws—that a State cannot in effect veto projects one way or another through other State laws that do not directly relate to hydropower. I think, for example, of how the Nuclear Regulatory Commission has authority over the licensing of nuclear power plants, and yet in the State of California, on non-safety criteria, there is in effect a ban on nuclear power plant construction.

So I do not know if I could support you in saying that there is not a virtual veto on the creation of hydro plants. States may have that authority.

But once it is agreed that there should be a plant, the sizing of that plant and how it is operated and how the amount of water that flows through it, versus gets diverted for other uses, is decided vis a vis recreational uses, archaeological side effects, particularly for rivers that flow through more than one State or rivers that flow into rivers that flow through other States, there needs to be, I think, a balancing of the larger regional interests. FERC is an agency that can do that, taking into account the larger needs of the regions and the many States.

For small projects—I would like to emphasize this because to us it is very important, and we worried about the States' rights question—for projects under 5 megawatts, which is small but not terribly small and includes a larger number of projects, and the majority of projects, we favor and the committee favors turning regulation entirely over to the States and taking it out of FERC's hands entirely.

Senator BURNS. I guess what concerns me, and I would ask you and Mr. Scherman both, who makes the final determination of national interest? You know, what might be national interest to you might not be the same to Pennsylvania. Who makes that determination?

Mr. KELLY. I might say, in the case of FERC we would hope for a consistent set of criteria that would be modified over time as national policy develops that looks at a broad range of interests.

Opponents of S. 106 will claim that different States use very different interests. In some States it will be fish and wildlife, in other States irrigation, and there would be less of a balance from one State to the other than you might get with an FERC approach.

Senator BURNS. I have no further questions.

Senator BRADLEY. Thank you very much, Senator Burns.

Senator Hatfield.

Senator HATFIELD. On this question, you might go back to the *Pelton Dam* case that was upheld by the Supreme Court a number of years ago under the Federal Power Commission's granting of a license to a Pelton Dam on the Deschutes River, which the State of Oregon had denied on the basis that they were fearful of what would happen to the fishery resource.

But let me ask you another question relating to that. We have today in the State a scenic wild river act, as well as a Federal Scenic Wild River Act. The State of Oregon overwhelmingly by referendum passed this referendum that included the Klamath as a part of the scenic wild river, in which there is a license pending before FERC today for a water project.

Now, I am not asking you to get into a pending case before you have made a decision. But is it conceivable that, with this clearcut decision by the people of Oregon acting as voters, not just as an agency, that this could be overruled by FERC by granting such a permit to build such a project? Is that conceivable?

I am just talking now in general cases.

Mr. SPRINGER. Senator, that is conceivable.

Senator HATFIELD. It is, okay. Now let me address—Mr. Kelly?

Mr. KELLY. I am not a lawyer, Senator Hatfield, and I am not sure, but I would like to add some balance to that answer. It is also conceivable, I think, that because FERC does not take away existing water rights, but more looks to granting a license to use water for which no rights have been appropriated, that if the State of Oregon played it correct legally they could perhaps—and I am just saying it is possible—appropriate the water rights for, in a sense, a fish and wildlife use and have it on the record as an appropriated right, which FERC might have to give respect to in its licensing consideration.

Senator HATFIELD. But not for scenic wild river?

Mr. KELLY. Perhaps for that purpose. I am only saying that that is a legal angle that might be pursued and sustained by the courts, as a non-lawyer. So that it is a question that could perhaps be answered either way depending on how the lawyers might argue it out.

Senator HATFIELD. Thank you, Mr. Kelly.

Mr. Scherman, as lawyers tend to do, we freeze time and events into some one very small frame. We are doing that now on the licensing authority and the licensing right. Is there an oversight that you come back and revisit at some time in the future, because you indicated that you take into consideration in the issuance of such permits and licenses at the Federal level, environmental values, environmental commitments, and so forth?

Why I raise this question is that the real problem that I see in this is not who is issuing the license and who is not issuing the license. I am not locked into this States' rights viewpoint. I respect and I want to always protect States' rights, but I am not—that does not really bother me.

What bothers me is that every one of those dams on the Columbia River have been licensed, they have been permitted, they have been approved by Federal agencies that took into consideration, at the time, the fishery resource and said that we must have investments to mitigate the fish loss. And yet if you did an oversight you would find that until President Bush offered his budget, every President, Democrat or Republican, in recent years has excised Mitchell Act funds, which was a solemn commitment by law that the Federal Government would fund mitigating programs for the fishery loss because of those dams.

Senator Magnuson and later, when he left, when I became the ranking member of the Appropriations Committee, we have had to add dollars and dollars to fulfill those solemn obligations that were contingent as part of the package of licensing.

This year, in spite of President Bush adding that, I am going to have to add $50 million just to sustain the current level of mitigating programs, mitigating the fish loss.

Now, I would like to just address that point. Do you have any system to revisit, to see that your permits, your licensing, has really been upheld with all of its contingencies and all of its components? That is the real problem that I see today in the Columbia River.

Mr. SCHERMAN. Let me answer that in two parts if I can quickly, Senator Hatfield. One is, as I mentioned earlier, in each license we issue there is the ability of somebody to come back before the Commission and say that circumstances have changed, requiring a condition in the license, and the Commission would take that very, very seriously.

As far as what program is in place——

Senator HATFIELD. But what are your options besides taking it seriously?

Mr. SCHERMAN. Again, it would depend. I know this will sound like a lawyerly answer, but because this is the process that we have, we would have to look at the evidence presented and make a judgment as to whether to exercise the reopener in the license to make a change.

We have in place a program, which Mr. Springer administers, that I think might give some insight into how we monitor license activity after it is initially licensed. Go ahead, please, Fred.

Mr. SPRINGER. Senator, to take what Mr. Scherman said a step further, based on the license articles that are in effect in almost all of the licenses issued in the last 20 or 30 years or more, there is at least one, if not more, reopener type clauses where any individual, in some articles fish and wildlife agencies and others, would be able to petition the Commission, as we just talked about, which would open a proceeding where the Commission would look toward the comprehensive development balance, to see whether it is appropriate today.

There will be public notices issued. We would ask for data and information from all of the appropriate resource agencies, Indian tribes if you are talking about, for example, the Northwest, and other concerned persons, the licensee, and do a technical analysis and a balancing. And if we find that, considering the effect on the power supply and the customers along with the non-developmental needs, the fish and wildlife, the other resources, if there is need to change the conditions of that license the Commission will do so and is able to do so under the license.

Senator HATFIELD. For the record, could you give us some time later a little research on any time that you have instructed the Forest Service in the cutting of timber on the riparian area of these rivers that affect the fishery resource, or the Corps of Engineers in its dredging policy, something that was violating basically your environmental value that you considered in the licensing, any other Federal agency which you instructed?

Mr. SPRINGER. We have no control over other Federal agencies, Senator.

Senator HATFIELD. Not control, just instructions or any kind of recommendations or suggestions.

Mr. SPRINGER. The Commission does not typically provide recommendations to those agencies.

Senator HATFIELD. Well, that is the problem.

Mr. SPRINGER. Within the licensing context, we do affect the license.

Senator HATFIELD. Even though it might be in violation of your entire licensing premise that those environmental values should be protected?

Mr. SPRINGER. Well, to the extent that that happens where the licensee is able to control, then we can condition the license in any way. But we have no ability to tell the Forest Service what to do or the Corps of Engineers what to do.

Senator HATFIELD. It was only a suggestion.

Thank you, Mr. Chairman.

Senator BRADLEY. Thank you very much, Senator Hatfield.

Let me pick up on something Mr. Kelly said and ask Mr. Scherman a question. In the *Rock Creek* ruling, the Supreme Court emphasized that FERC was required to respect State water rights, proprietary interests. That was very clear in *Rock Creek*.

What do you think would happen if California had issued an in-stream flow right to, say, the Nature Conservancy, instead of just trying to regulate the project? Would FERC have had to respect that in-flow right?

Mr. KELLY. Well, as I said before——

Senator BRADLEY. Let us let FERC.

Mr. SPRINGER. Senator, the Commission in that particular case, when faced with trying to determine what the Commission felt was the appropriate minimum flow for fisheries mitigation and enhancement in that river, we would have had to take a look at generally the same information, the same technical information, and we would have tried to reach a decision probably very similar to the one that we reached in our balancing.

If it was determined for some reason that the licensee could not obtain the rights that the Commission might have specified, we would have, I guess, tried to get the licensee to acquire those rights. We have not ever had a situation of the kind you mentioned that I know of, where a State had appropriated.

Senator BRADLEY. But you cannot override agricultural water rights, right? So what if the State issued in-stream flow rights to, say, the Nature Conservancy?

Mr. SPRINGER. Well, the problem in *Rock Creek*, Senator, was that the license had already been issued. For example, had this happened when the license was still before us, was pending before us, and a right, an appropriated right, or a use of some sort was on the books, so to speak, and the Commission was aware of it, we could very well have taken that into consideration and possibly not have issued the license because of the fact that it might not have been financially feasible, taking everything into consideration.

In the *Rock Creek* case, the license had been issued and we were faced with having an existing project that was serving the power

supply and there was a question of financial feasibility on top of balancing a comprehensive development problem.

It is a little bit different question when there is an existing project. But I think if we are talking about an unlicensed project that was in front of us to be licensed, clearly what you are talking about as a way of preserving rights for in-stream uses, the Commission would have to consider, and I doubt seriously we would have affected that.

Senator BRADLEY. Mr. Kelly, do you have anything to say?

Mr. KELLY. Well, again this is speculative, Mr. Chairman.

Senator BRADLEY. Well, let us look at it. Forget *Rock Creek*. Can FERC override a water right issued by the States for in-stream flow?

Mr. KELLY. Well, my speculation is that FERC has to honor State proprietary water rights that have been given out in advance of the license application. And I can imagine that if a State were to do a comprehensive plan for the rivers in its State it could issue, let us say, to the State Department of Interior a proprietary right to set aside certain flows for fish and wildlife purposes, which were owned by the State and were not there, let us say, just to block the hydro project so that after the hydro project application failed the State could turn around and give those rights away to an irrigator, for example; that would be obviously a phony attempt to thwart FERC. If it was a preexisting right and it was a serious right that was not there just to exercise State preemption over FERC authority, the preexisting right may be something that the courts would uphold.

Now, that is a speculation on my part.

If, however, in the middle of a license process, the State created a temporary right just for one river, just for the purpose of trying to thwart FERC authority, I could not see that being upheld.

Senator BRADLEY. Would you support an amendment to the Federal Power Act to make it clear that FERC cannot override or has to respect all State water rights?

Mr. KELLY. All preexisting proprietary water rights, yes.

Senator BRADLEY. For whatever purpose?

Mr. KELLY. I believe we would.

Senator CRAIG. Consumptive, nonconsumptive? I believe what you have said, Mr. Kelly, and what Mr. Scherman has just said are in direct conflict.

Senator BRADLEY. Do you, Mr. Scherman?

Mr. SCHERMAN. We will have to balance that.

[Laughter.]

Mr. KELLY. Well, I said it for proprietary water rights, which normally are for consumptive uses.

Senator BRADLEY. What about in-stream, in-stream water rights? We are talking about protecting fish and wildlife here. If the State decides that that is worth granting a water right to?

Mr. KELLY. I think we may if it is considered a proprietary right, as a kind of consumptive use. Now, it must be a different sort of consumptive use, but it is the kind where you could not later give it away, you could not later say that people could come in and take that right away after the license had been defeated.

Let me ask my colleague, Mr. Carrier——

Senator BRADLEY. No, I want to hear from Mr. Scherman on this. Mr. Scherman, what do you say?

Mr. SCHERMAN. Senator Bradley, let me go back one step. We are aware of no actual instance where, when presented with evidence during the licensing process, that a FERC license and the rights granted through a FERC license resulted in a direct conflict with a State consumptive proprietary water right.

Under ECPA, the Congress directed each State to develop comprehensive State plans over how in each State they wanted the water to be allocated and used. To date we have had 522 of those plans; 522 of those plans have been issued. Obviously, the States have used them for different resources in different States.

We have only had two cases since ECPA where there was even an arguable licensing decision that was inconsistent with a State-filed comprehensive plan. So the scenario that you outlined about conflicts between consumptive and nonconsumptive rights is an appropriate one to address. We are sensitive to it, and again we will go back and check and provide further information for the record.

But that actual conflict, we have not seen it. And I do not want to sit here and tell you that you are not raising legitimate public policy concerns and that the Federal Government is better at making these value judgments. There is a national interest in the comprehensive development of the waterways and a national interest in hydro as part of the overall energy mix. There is no doubt about that.

There is also a State interest in water rights. How you all balance those and who makes that decision is a legitimate public policy concern. We think it belongs——

Senator BRADLEY. Could a State try to get around *Rock Creek* by offering an in-stream water right or a water right for future consumptive uses upstream?

Mr. SCHERMAN. Again, I think the State would provide that information to the Commission in the licensing process. We would not seek to infringe upon an existing consumptive proprietary right. And again, I am not aware of any situation—and I want to be clear; we did some quick checking on this and we will provide further information for the record if I am mistaken—of an actual conflict of the kind you are discussing.

[The information referred to follows:]

FERC has found no instance of an actual conflict of this kind that was presented directly to FERC in a timely manner.

Senator BRADLEY. Thank you very much, Mr. Scherman.

We have a slight problem here. We have 13 more witnesses and we have about an hour to go. We are going to have to move on. Let me thank you very much for your testimony.

Before you go, though, I would like to ask you just one more question, and it has to do with a section in the act, and perhaps Senator Craig could help clarify what his intention is here as well. *Rock Creek* dealt primarily with the Federal Power Act. There are ways to deal with that.

There is a section in section 27 that says something that I think gives rise to the feeling that it goes further than that. It says:

"Nothing in this act nor in any other act may be construed to constitute a preemption or intent to preempt State water right."

Now, as you read that, you heard what Senator Craig said about Indian water rights. What about Clean Water Act? What about other aspects? I mean, I do not think it is Senator Craig's intention to essentially affect international compacts or interstate compacts. I do not think that is Senator Craig's intention.

Maybe you will not have to answer.

Senator CRAIG. What is very important to understand is that this is an amendment to the Federal Power Act and it must be read in the context of section 27 of that act. And when you do that, it takes its meaning from the act, not power over everything else. And I think I am correct in that interpretation.

That is clearly the intent.

Senator BRADLEY. So it was not your intent to override these other things, obviously.

Senator CRAIG. That is right.

Mr. SCHERMAN. That is the way we read it as well.

Senator BRADLEY. Thank you very much.

Senator CRAIG. Mr. Chairman, if I could for the record, not to get an answer now for time, but to get an answer for the record. Mr. Kelly, where you have accepted the concept of the energy policy that this committee, full committee, produced as relates to 5 megawatts, do you—and please answer this, not now, but for the record and to me—do you accept the idea then that the States have the right to issue water rights for those purposes and have the power to so control?

That is an arbitrary dividing line, and it is interesting that we could divide it one place and we have chosen not to divide it some place else, or your defense argues that of your current situation or position. And I would want to know if there would be consistency, if you would carry through.

Mr. KELLY. We would be pleased to answer. Thank you.

[The information referred to follows:]

Our reading of the provision in S. 1220 that permits State licensing of small hydropower projects is that projects that qualify will not be subject to the licensing provisions of the Federal Power Act. S. 1220 would give the States exclusive authority to license projects of 5 megawatts or less under State laws, which would include State water laws. This is consistent with the National Energy Strategy and is supported by the Administration.

Senator BRADLEY. Thank you very much.

Our second panel consists of: the Honorable Peter T. Coleman, Governor of American Samoa, on behalf of the Western Governors Association; the Honorable Larry EchoHawk, Attorney General of the State of Idaho, on behalf of the Conference of Western Attorneys General; D. Craig Bell, Executive Director, Western States Water Council; John McSparran, Director, Bureau of Water Resources Management, Pennsylvania Department of Environmental Resources, on behalf of Interstate Council on Water Policy; and John Fraser, who is Executive Director and General Counsel, Association of California Water Agencies, Sacramento.

Let me welcome all of you to the hearing. Because this is a very large witness list, we will have to now abide by what each of you were informed of prior, and that is to try and limit your statement

to 5 minutes. That is our only hope of getting through the remaining 13 witnesses some time before it is too late.

That should be ambiguous enough and ominous enough that all of you will abide by it.

Governor Coleman.

STATEMENT OF HON. PETER T. COLEMAN, GOVERNOR, AMERICAN SAMOA, ON BEHALF OF WESTERN GOVERNORS' ASSOCIATION, ACCOMPANIED BY KEITH HIGGINSON, DIRECTOR, IDAHO DEPARTMENT OF WATER RESOURCES

Governor COLEMAN. Thank you, Senator Bradley and members of the committee.

As a member of the Western Governors' Association and as a former Chairman of its antecedent, the Western Governors' Conference, on behalf of our current Chairman, Governor Mickelson of South Dakota, I am pleased to be here today to submit the Western Governors' Association's position in support of S. 106, a bill to amend the Federal Power Act.

I am sorry that Governor Mickelson could not be here to testify in person, but he wrote you a letter dated May 30, which I believe you have received. I would ask that it be made part of the record at this point.

Senator BRADLEY. It will be made a part of the record.

Governor COLEMAN. Water is critical to the economic and social wellbeing of the western States. The western State water law is designed to fairly allocate rights to the use of water for all purposes. The Western Governors' Association believes that the amendments to the Federal Power Act offered in S. 106 will accomplish the goal of assuring that Federal Energy Regulatory Commission licensees comply with the procedural and substantive requirements of State law.

The Western Governors' Association is pleased that you are taking up this important matter and urges you to support S. 106. As this bill does not apply to my own territory of American Samoa, I am pleased to be sharing this table with several eminent persons who are here also to testify and to whom I will defer on any questions the committee may have.

Thank you for allowing me to participate in this important hearing on behalf of the Western Governors.

[The letter of Governor Mickelson follows:]

WESTERN GOVERNORS' ASSOCIATION,
Denver, CO, May 30, 1991.

Hon. BILL BRADLEY,
Chairman, Water and Power Subcommittee, Senate Energy and Natural Resources Committee, Washington, DC.

DEAR CHAIRMAN BRADLEY: Throughout its history, Congress has been guided by the cardinal principle of deference to state management and allocation of water resources. States have developed water systems that provide certainty of supply and allow for an equitable balancing of interests in allocating scarce water resources. Thus, state management of water resources allows states to make choices regarding development and quality of life priorities, and places the responsibility for complex hydrological determinations in the hands of those closest to the problem.

Maintaining these state prerogatives is increasingly important in the current era of reallocation, as traditional values and demands for water are shifting. Quite simply, allocation and reallocation decisions cannot be made effectively by distant federal level managers and are best made at the state and local levels.

When the Federal Power Act (FPA) was enacted, Congress deferred to state regulation over the control, appropriation, use and distribution of water. Nevertheless, conflicts arose over the appropriate division of authority for water use associated with hydropower projects.

On May 21, 1990, in its *California* v. *FERC* decision, the U.S. Supreme Court held that FERC had exclusive jurisdiction to set hydroelectric power project bypass water flow rates. This decision allowed the FERC licensee to ignore requirements the State of California sought to impose to protect a downstream fishery. Thus, FERC is now effectively determining what levels of water resources will exist within this stream for the state of California. Such a result can only lead to conflict, particularly where the federal agency has no way of determining other demands upon the limited water resources within California.

The *Rock Creek* decision impairs the ability of the states to protect environmental and recreational uses by denying or placing conditions upon the diversion and use of water. FERC interprets the *Rock Creek* decision to allow FERC licensees to use water for hydropower development without regard for state requirements designed to protect the environmental and instream needs of state citizen. Indeed, all uses of water administered by the states—irrigation, recreation, fish and wildlife, municipal, industrial, hydropower, and others—will be affected by FERC's licensing decisions because of the highly interdependent nature of water uses. Each water user affects the quantity and the quality of water available for other users within a river system. Even more than other users, hydropower facilities affect other water users by dewatering portions of streams or by storing water for release at times of peak power demand, leaving less water downstream to satisfy other uses at certain times. Operation of hydropower facilities can also cause rapid fluctuations in the flows of a river. Further, the licensing of new hydropower projects on fully allocated stream systems without adequate knowledge and allowance for existing uses causes disruption to proprietary water rights. Each of these effects can have a dramatic impact upon existing and future water uses, fisheries, recreation, and aquatic habitat.

Congress should amend the Federal Power Act to clarify the respective roles of state and federal governments. S. 106 amends Sections 9(a) and 27. Western governors believe these amendments will accomplish the goal of assuring that FERC's licensees comply with procedural and substantive requirements of state law that are designed to fairly allocate rights to the use of water for all purposes. S. 106 will not change the provisions of the Electric Consumers Protection Act of 1986, which directs FERC to evaluate public interest considerations such as irrigation, flood control, fish, wildlife, and recreation. It is important to recognize, however, that FERC's authority to consider public interest criteria does not resolve the conflict between state water management and FERC procedures. The 1986 amendments are not an adequate substitute for state water allocation procedures. The record made for the purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not have at its disposal, nor can it develop and review, the extensive state water rights, records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state. States, on the other hand, are free to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other users.

Western governors also support Senator Jeffords' bill (S. 812) to strengthen the states' role in certifying that proposed hydropower projects comply with state water quality requirements. While this bill will allow states to better protect the water quality of streams and rivers, it does nothing to address the larger problem of establishing stream flow and bypass requirements necessary to protect existing water users or to ensure adequate flows for wildlife or other instream uses of water. The opportunity to assure water quality compliance is not a substitute for compliance with state water allocation laws and a full consideration of the effects of a proposed hydropower project relative to the public interest.

In conclusion, the setting of water diversion and use conditions to protect public values and water rights is part of the western states' water right process. If an applicant for a FERC license must also obtain a state water right and must advise FERC under 9(b) that they have complied with the laws of the state, then FERC would know the conditions under which water could be used by the proposed project before issuing a license. If, however, FERC's interpretation of the *Rock Creek* decision is allowed to stand, then FERC will continue to assert exclusive authority to establish water flows and use conditions for hydropower projects, allowing FERC to

ignore state laws and policies with impunity. Western governors urge you to support S. 106.

Very Truly Yours,

GEORGE S. MICKELSON, *Chairman.*

Senator BRADLEY. Thank you, Governor Coleman.

The Honorable Larry EchoHawk.

STATEMENT OF HON. LARRY ECHOHAWK, ATTORNEY GENERAL, STATE OF IDAHO, BOISE, ID, ON BEHALF OF THE CONFERENCE OF WESTERN ATTORNEYS GENERAL, ACCOMPANIED BY CLIVE STRONG, DEPUTY ATTORNEY GENERAL, NATURAL RESOURCES DIVISION

Mr. ECHOHAWK. Thank you, Mr. Chairman.

I appear here as Idaho Attorney General in support of S. 106, and I ask that my written statement be submitted in detail as part of the record.

Senator BRADLEY. Your statement will be in the record.

Mr. ECHOHAWK. And also that a letter we have submitted on behalf of the Western Conference of Attorneys General appear in full.

Senator BRADLEY. That letter will also be in the record.

Mr. ECHOHAWK. Mr. Chairman, I am also joined at the witness table with Clive Strong, who is the Division Chief over Natural Resources within the Office of the Attorney General and is the author of the State amicus brief before the U.S. Supreme Court, and he will be available to assist in answering questions.

I would like to point out that the National Association of Attorneys General and also the Western Conference of Attorneys General have passed resolutions that support S. 106.

Idaho had the pleasure of taking the lead in the litigation that went to the U.S. Supreme Court, preparing a brief that was signed on by 48 other State Attorneys General. This means that the effect was that all 50 State Attorneys General supported the position of giving primacy to State water regulation.

The need for this legislation arises out of FERC's decision within the last decade to ignore congressional intent regarding preservation of State regulation of water uses. Instead, FERC now aggressively asserts authority to preempt traditional State regulation of water rights within each State.

FERC's action represents a dramatic change in Federal policy. For more than 50 years following enactment of the Federal Power Act, FERC recognized State authority to establish water rights for hydropower projects. During this period of cooperation, FERC and States were able to work together to fulfill congressional hydropower goals. This 50-year history demonstrates that Federal policies toward hydropower development can be successfully implemented in conjunction with State regulation of water rights.

In Idaho we have the example of having all FERC projects that have complied with State water law and regulations. So I believe there is a proven record that this kind of cooperation can work.

In recent years the licensing decisions made by FERC have established—they have asserted authority to establish the amount of water that a hydropower licensee may divert and the authority of

water that a hydropower lessee may divert and authority to regulate the use of water rights.

Regulation of hydropower water rights is of critical importance because of the highly interdependent nature of water uses. Each water user affects the quantity and quality of water available for other users within a river system, impacting existing and future water uses, fisheries, recreation, and aquatic habitat.

I might point out that this applies whether we speak in terms of consumptive or nonconsumptive uses. Even if you are dealing with nonconsumptive use, the decisions that are made by FERC still affect water users on an entire river system.

Because of the interdependence of water uses, States have developed comprehensive systems to control the complex interplay of diversion, use, conservation, and reuse of water. If FERC is allowed to remove the States' regulatory control over the use of water for hydropower, the remainder of the States' comprehensive water law system will fall like a house of cards.

The result will be a loss of the carefully maintained order that States have arranged among the many competing uses of water.

Senator BRADLEY. If you could wrap up in a minute, I would appreciate it.

Mr. ECHOHAWK. The system that FERC asserts is unworkable. They do not have the expertise, the experiences, nor the resources to make these important decisions based upon what is in the public interest. The hearing process is not an adequate forum to fully delve into the entire water management system that decisions by FERC will affect. That is best left into the hands of States, who have been working in this area of balancing interests for a number of years.

Idaho has a comprehensive system that has been being put in place since 1988. At best, FERC will say that they will consider the comprehensive plans that Idaho has, but there is nothing to obligate or mandate that that comprehensive water planning system will be followed.

I believe that what we would like to urge the committee here to do is to sanction 106, to make sure that this longstanding tradition of deferring to State water policy is adhered to.

[The prepared statement of Mr. EchoHawk and the letter from Mr. Spaeth follow:]

PREPARED STATEMENT OF LARRY ECHOHAWK, ATTORNEY GENERAL, STATE OF IDAHO, BOISE, ID, ON BEHALF OF THE CONFERENCE OF WESTERN ATTORNEYS GENERAL

Mr. Chairman and members of the Subcommittee, I am Larry EchoHawk, Attorney General of the State of Idaho. I appreciate the opportunity to testify before you today. I appear on behalf of the National Association of Attorneys General and the Conference of Western Attorneys General as well as in my capacity as Attorney General of Idaho. Both the National Association of Attorneys General and the Conference of Western Attorneys General have passed resolutions endorsing this legislation.

Idaho has been heavily involved in the effort to preserve traditional state regulation of water rights for hydropower facilities licensed by the Federal Energy Regulatory Commission. We authored amicus curiae briefs in the *California* v. *FERC* case in both the Ninth Circuit Court of Appeals and the United States Supreme Court. Idaho's amicus brief in the Supreme Court in support of California was joined by the Attorneys General of the other 48 states. Thus, all fifty states were united in their support of continued state regulation of water rights associated with hydroelectric projects.

The states are similarly united in their support of S. 106, which would reaffirm the original intent of Congress that the Federal Power Act does not preempt state regulation of water rights for hydropower facilities licensed by FERC. S. 106 would promote the principles of state-federal cooperation embodied in the original FPA by correcting FERC's assertion that the FPA vests it with virtually plenary control over water uses associated with or affected by hydropower projects.

The need for this legislation arises out of FERC's decision in the last decade to ignore congressional intent regarding preservation of state regulation of water uses. Instead, FERC now aggressively asserts the authority to preempt traditional state regulation of water uses within each state. FERC's action represents a dramatic change in federal policy. For more than 50 years following enactment of the FPA, FERC recognized state authority to establish water rights for hydropower projects. During this period of cooperation, FERC and the states were able to work together to fulfill congressional hydropower goals. This fifty year history demonstrates that federal policies toward hydropower development can be successfully implemented in conjunction with state regulation of water rights.

The fifty years of successful state and federal cooperation in hydropower development and regulation affirmed the wisdom of Congress' decision in the original FPA to retain traditional state authority to manage water resources. The states have developed various systems to fairly allocate water among the many competing uses such as electrical generators, irrigators, municipalities, industries, fish, wildlife and recreation. FERC's actions threaten to disrupt the delicate balance of interests that the states have reached after more than a century of managing their water resources.

In recent licensing decisions, FERC has asserted the authority to establish the amount of water that a hydropower licensee may divert, and the authority to regulate the use of the water right so as to control how it affects other water users. Regulation of hydropower water rights is of critical importance because of the highly interdependent nature of water uses. Each water user affects the quantity and the quality of water available for other users within a river system, impacting existing and future water uses, fisheries, recreation, and aquatic habitat. Because of the interdependence of water uses, states have developed comprehensive systems to control the complex interplay of diversion, use, conservation, and reuse of water. If FERC is allowed to remove the states' regulatory control over the use of water for hydropower, the remainder of the states' comprehensive water law systems will fall like a house of cards. The result would be a loss of the carefully maintained order the states have arranged among the many competing uses of water.

The implications of the *California* v. *FERC* decision are best understood when examined in the context of the two principle water law doctrines followed by the states. In the west, most states follow the prior appropriation doctrine. Under this doctrine, the first person to put water to beneficial use has the first right to the use of water. Obviously, in order to determine what water is available one must know the priority date, the period of use, and the rate of diversion of every other existing water right. If FERC's interpretation of *California* v. *FERC* prevails, then there will be two water systems operating side by side but independent of one another. Such a result insures a reoccurrence of the classic tragedy of the commons. The absence of any single regulator will result in an over utilization of the resource interests and an inequitable allocation of the resource to the detriment of all interests.

In the east, most states follow the riparian water law doctrine. Under the riparian doctrine, all landowners abutting a watercourse share the natural flow on a reasonable use basis. If FERC takes it upon itself to authorize projects that interfere with the reasonable use of the natural flow by other riparian proprietors, then the established allocation of water will be completely undermined.

An even more troubling aspect of FERC's recent decisions is its assertion that when it licenses a hydropower project, it retains a "general reserved authority" to decide whether other water uses on the same river system may be accommodated. In some instances, FERC has required that before state water agencies may approve diversions upstream of FERC-licensed hydropower projects, the state must petition FERC for amendment of the hydropower license. In other instances, FERC has refused to include protections for existing water users when establishing water rights for hydropower facilities. Instead, FERC requires the water users to petition FERC for a reduction in use of water by the licensee, with such reduction to be granted only if FERC decides that the existing uses are in the public interest.

FERC's assertion of authority to regulate both hydropower water rights and competing water rights is unworkable. FERC is simply incapable of assuming the regulatory powers traditionally exercised by the states. FERC has not developed the expertise or the resources necessary to make the decisions necessary to fairly allocate

scarce water resources among competing uses. The record made for the purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not have at its disposal nor can it develop and review the extensive state water rights records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state.

States, on the other hand, have developed regulatory systems that allow them to maximize the benefits of hydropower development while still protecting existing uses and environmental concerns. State regulation fairly balances competing concerns and best promotes the general public welfare.

FERC's misunderstanding of the FPA was recently perpetuated by the Supreme Court's decision in *California* v. *FERC*, where the Supreme Court was presented with the issue of whether the FPA preempts state water regulation for FERC-licensed hydropower projects. The Court declined to reach the merits of the issue, and instead relied on its 1941 decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*, which contains language suggesting that the FPA was intended to preempt state regulation of water use for hydropower projects. The issue of state preemption, however, was not directly presented to the Court in *First Iowa*, and the language suggesting state preemption was not well reasoned. In *California* v. *FERC*, the Court admitted the shortcomings of the *First Iowa* decision, and even stated that in a case of first impression there would be substantial reason to hold that the FPA does not preempt state regulation of hydropower water rights. The Court, however, felt that it was bound by principles of *stare decisis* to stand by the *First Iowa* decision, no matter how badly decided, and ruled in favor of FERC regulation of water use for hydropower projects. The Court's apprehension with its ruling is demonstrated by the fact that it expressly noted that Congress could correct through legislation any misunderstanding of congressional intent perpetuated by the Court's reliance on the *First Iowa* decision.

The *California* v. *FERC* decision has emboldened FERC to make ever-broader assertions of regulatory authority. In addition to claiming preemption of state regulations conflicting with FERC license requirements, FERC now asserts that the FPA totally occupies the field of water regulation connected with hydropower projects, thereby leaving no role for states in the regulation of water uses for FERC-licensed projects. Under this new interpretation of the FPA, states are reduced merely to declaring the existence or non-existence of prior vested rights in water, and may not regulate any other aspect of hydropower projects, even if that aspect is not covered in the license issued by FERC. FERC's position is in direct conflict with statements made by the Solicitor General in oral argument before the Supreme Court. In defending FERC's position in the *California* v. *FERC* case, the Solicitor asserted that Congress only intended a conflict preemption test with regard to state regulation of water for hydropower purposes.

In conclusion, I urge this committee to accept the Supreme Court's invitation in *California* v. *FERC* to correct the misunderstanding of congressional intent embodied in the *First Iowa* decision and perpetuated in *California* v. *FERC*. Enactment of S. 106 would effectively remove any question that Congress intends to preempt state regulation of water uses, and would continue Congress' long tradition of deferring to state water law systems. The bill's basic provision is straightforward: no federal hydroelectric facility license shall be granted unless the applicant complies with state laws regarding the acquisition of water rights and administration of the use of water. The basic role of FERC in hydropower development and regulation would remain unchanged. Enactment of S. 106 would restore the integrity of state water laws without detracting from federal authority, and allow the States to resume their traditional role of cooperation with FERC in the licensing and regulation of hydropower projects.

CONFERENCE OF WESTERN ATTORNEYS GENERAL,
San Francisco, CA, May 29, 1991.

Hon. J. BENNETT JOHNSTON,
Chairman, Senate Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

RE: S. 106

DEAR SENATOR JOHNSTON: The Conference of Western Attorneys General (CWAG), which consists of the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, strongly support enactment of S. 106, which would amend the

Federal Power Act (FPA) to clarify that the Act does not preempt state authority to regulate the use of water by hydropower facilities licensed by the Federal Energy Regulatory Commission (FERC). The bill is in keeping with the original intent of Congress in enacting the FPA and promotes the notions of federalism upon which this country was founded. CWAG believes S. 106 is needed to curb FERC's interference with traditional state sovereign authority to regulate the use of waters within each state, and to correct the misunderstanding of congressional intent perpetuated by the Supreme Court's decision in *California* v. *FERC*. 110 S. Ct. 2024 (1990).

In *California* v. *FERC*, the Supreme Court was presented with the issue of whether the FPA preempts state water allocation for FERC-licensed hydropower projects. The Court declined to reach the merits of the issue, and instead relied on its 1941 decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*, where the Court stated its belief that the FPA preempted state regulations of water use for hydropower projects, even though the issue of state preemption was not directly presented to the Court. Although the Court recognized the shortcomings of the *First Iowa* decision, and even stated that in a case of first impression there would be substantial reason to hold that Congress did not intend to preempt state regulation of hydropower water rights when enacting the FPA, it adhered to principles of *stare decisis* and held that state regulation of water use for hydropower purposes was preempted.

The FERC has treated the Supreme Court's decision as vindicating its policy of aggressively federalizing water allocation decisions relating to all uses of water related to hydropower water projects. Although FERC recognized state authority over water rights associated with hydropower projects for more than 60 years, FERC changed its policy in the 1980's and began asserting that the FPA preempted state regulation of the use of water for hydropower facilities. FERC's position undermines the stability of all other state created water rights.

Since the Supreme Court's decision, the FERC has intensified its efforts to limit state authority by adopting the position that the FPA, as amended in 1986, totally occupies the field of water allocation connected with hydropower projects, thereby preempting state regulation of use of water for FERC-licensed projects. Under FERC's interpretation of the FPA, states are reduced merely to declaring the existence or non-existence of prior vested rights in water, and may not regulate any other aspect of hydropower projects, even if that aspect is not covered in the license issued by FERC. The FERC has adopted this position despite statements by the Solicitor General in oral argument before the Supreme Court that Congress only intended a conflict preemption test with regard to state regulation of water for hydropower purposes.

The recent actions of the FERC, in conjunction with the decision in *California* v. *FERC* are adversely affecting the traditional authority of the states to manage their water resources. The states have developed various systems to fairly allocate water among the many competing uses such as electrical generators, irrigators, municipalities, industries, fish, wildlife and recreation. If allowed to stand, the *California* v. *FERC* decision—particularly as it is now interpreted by FERC—will disrupt the delicate balance of interests that the states have reached after more than a century of managing their water resources. The practical effect of the decision is that all uses of water administered by the states—irrigation, recreation, fish and wildlife, municipal, industrial, hydropower, and others—may be affected by the FERC's licensing decisions.

FERC decisions affect far more than just hydropower development because of the highly interdependent nature of water uses. Each water user affects the quantity and the quality of water available for other users within a river system, impacting existing and future water uses, fisheries, recreation, and aquatic habitat. Because of the interdependence of water uses, states have developed comprehensive systems of state laws controlling the complex interplay of diversion, use, conservation, and reuse of water. Like a house of cards, removal of the states' regulatory control over the use of water for hydropower threatens the downfall of the states' comprehensive water law systems, which have maintained order among the many competing uses. Thus, the FERC's federalization of hydropower water allocation has impacts far beyond the authority vested in the FERC by Congress, and disrupts the ability of the states to regulate and allocate water among all users.

Even though the FERC has worked to usurp state authority over water allocation, it has not developed the expertise or the resources necessary to effectively allocate water resources. The 1986 amendments to the Federal Power Act, while allowing the FERC to explore public interest considerations, do not provide an adequate substitute for state water allocation procedures. The record made for the purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not

have at its disposal nor can it develop and review the extensive state water rights, records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state.

States, on the other hand, are able to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other users. Thus, state control over water allocation best promotes the general public welfare. State control is also consistent with federal energy policies. For over fifty years, states regulated the water rights associated with FERC-licensed hydroelectric projects. During that time, the federal government's policy of hydroelectric development flourished. This long history of cooperation between FERC and the states demonstrates that federal policies toward hydropower development can be successfully implemented in conjunction with state regulation of water rights.

In *California* v. *FERC*, the Supreme Court recognized the impact its decision would have on traditional state management of water allocation, and invited Congress to revisit the issue by amending the FPA. S. 106 accepts the Supreme Court's invitation to settle this issue in accordance with Congress' traditional policy of deference to state regulation of water. The bill's basic provision is straightforward: no federal hydroelectric facility license shall be granted unless the applicant complies with state laws regarding the acquisition of water rights and administration of the use of water. Enactment of S. 106 would restore the integrity of state water laws without detracting from federal authority, and allow the states to resume their traditional role of cooperation with FERC in the licensing and regulation of hydropower projects.

Sincerely,

NICHOLAS J. SPAETH,
Chairman,

Senator BRADLEY. Thank you very much.
Mr. Bell.

STATEMENT OF D. CRAIG BELL, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL, MIDVALE, UT

Mr. BELL. Thank you, Mr. Chairman. I appreciate the opportunity to testify on behalf of the Council. The Council consists of representatives appointed by the Governors of 18 Western States.

We support S. 106. I want to begin by acknowledging the chairman's remarks to the Western States Water Council a few weeks ago. It says better than I can, I think, what we are trying to achieve with regard to this bill. You said at the time: "The licensing or relicensing of virtually any hydroelectric facility raises issues of vital State-level concern and responsibility, and the States must be able to protect those interests. There are legitimate concerns and prerogatives at each level of government which should be protected in the hydroelectric licensing process. I am prepared to support legislation which would strike a reasonable balance between the two reservoirs of sovereignty."

We believe S. 106 accomplishes that result. If, however, it is the judgment of the subcommittee that it does not, we are certainly willing to work with the sponsors, members of the subcommittee, to achieve that result, because we think the objective that you have expressed is an important one and does not exist in the status quo.

I would like to just briefly respond to some of the major objections during the balance of my time that have been raised regarding this bill. First of all, opponents of the bill argue that it is unsound on the basis that Federal preemption is necessary because balancing many conflicting public uses can only be carried out effectively and efficiently if controlled by a single agency.

This argument, when examined in the context of western water management and use, rather than a call for fair and efficient treat-

ment, is a call for special treatment for hydropower uses. State laws have held the primary role in water allocation and use since the earliest times in the history of the West. As Federal interests—and by the way, Congress has repeatedly deferred to that State role.

As Federal interests have increased, it is quite common for State water right applicants to also be required to obtain various Federal permits. Compliance with both Federal and State permit requirements relative to water use enables both the Federal Government and the State government to protect their legitimate interests.

Indeed, this was precisely the arrangement that existed for decades under the Federal Power Act. Until *First Iowa*, the Federal Power Commission itself required its applicants to comply with State law. And although you will hear theory about what might happen if this bill is passed, I do not think you will hear any evidence that that arrangement which existed for decades proved unworkable or undesirable or an unnecessary hindrance to reasonable hydropower development. In other words, that arrangement worked.

The other argument that has been raised is that FERC is the necessary arbiter in terms of interstate conflicts. I just say that such conflicts are relatively rare. Most of them are worked out amicably between States. When that is not the case, they have tools available, such as an equitable apportionment lawsuit or an interstate compact. Interstate compacts in the West are common. I am not aware that the Federal Energy Regulatory Commission was ever involved as an arbiter in terms of those interstate compacts.

Lastly, I would say that opponents argue that the legislation goes too far, in that it would preempt the Federal Energy Regulatory Commission from protecting legitimate Federal interests, such as those expressed in the 1986 ECPA amendments.

It is not the intention of the Western States Water Council, nor do we read the proposed legislation, as providing that FERC would be thus preempted.

Thank you.

[The prepared statement of Mr. Bell follows:]

PREPARED STATEMENT OF D. CRAIG BELL, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL, MIDVALE, UT

Mr. Chairman and members of the Subcommittee: On behalf of the Western States Water Council, I appreciate this opportunity to testify on S. 106 and the impacts of the Supreme Court's decision in *California* v. *FERC* which S. 106 is intended to redress. The Council consists of representatives appointed by the governors of eighteen western states. To start, I would like to acknowledge and commend Chairman Bradley's written comments on this subject which he provided to the Council about six weeks ago. In pertinent part, they are as follows:

> To begin with, I do not endorse the view that the Federal Energy Regulatory Commission should be empowered to disrupt the legitimate authorities of the States to administer their water laws. FERC does not have a monopoly on wise public policy, nor does FERC have the experience and understanding of local conditions and concerns that the States have. The licensing or relicensing of virtually any hydroelectric facility raises issues of vital State-level concern and responsibility, and the States must be able to protect those interests.
>
> It is also true, however, that the licensing or relicensing of many hydroelectric facilities will raise questions of genuine national concern, including international and interstate issues, migratory fish and wildlife, and Indian

rights. I think it is beyond serious argument that the Federal government has a legitimate responsibility to attend to these matters.

There are legitimate concerns and prerogatives at each level of government which should be protected in the hydroelectric licensing process.

I am prepared to support legislation which would strike a reasonable balance between the two reservoirs of sovereignty.

We believe S. 106 accomplishes this result. But if, in the judgment of the subcommittee, it does not, we are willing to work together with the sponsors of S. 106 and members and staff of the subcommittee to achieve this result. The Council does not intend, nor does it interpret S. 106 to provide, that federal interests in hydropower development would be thereby preempted. As evidence of this intent, I would refer to the Council's recent resolution on this subject, a copy of which is attached as part of our testimony. The resolution calls for restoration of state authority to protect state interests, but makes clear that federal interests as expressed in the ECPA amendments to the Federal Power Act should be retained. In other words, the Council resolution seeks the reasonable balance between the two reservoirs of sovereignty which Chairman Bradley calls for.

The 1986 ECPA amendments directed FERC to evaluate public interest considerations such as irrigation, flood control, fish, wildlife, and recreation. They also require FERC to consider a project's consistency with a state comprehensive plan for a waterway. But the record made for the purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not have at its disposal, nor can it develop and review, the extensive state water rights, records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state. States, on the other hand, are free to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other users. Moreover, the amendments gave no authority to the state to condition water use and no mandate to FERC requiring consistency with state plans and priorities. Thus, the ECPA amendments are not an adequate substitute for compliance with state water allocation procedures.

The Council also supports Senator Jeffords' bill (S. 812) to strengthen the states' role in certifying that proposed hydropower projects comply with state water quality requirements. But again, this one-time opportunity to assure water quality compliance is not a substitute for compliance with state water allocation laws and a full consideration of the proposed project's effects relative to the public interest.

If Congress does not enact S. 106 or a similar measure, it will have failed to correct an imbalance in federal/state regulatory authority created by the Supreme Court's decision which upheld FERC's views contrary to what we believe Congress intended in enacting the Federal Power Act.

Section 27 reads:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses or any vested right acquired therein. (16 U.S.C. 821)

The Supreme Court allowed that the statute's language presented a close question, but upheld its earlier *First Iowa* interpretation, stating that it was better to have the matter settled than settled right. The Court added ". . . Congress remains free to alter what we have done."

While the matter may be settled, we do not believe it has been settled right. Therefore, we urge the Subcommittee and the Congress to act to restore the appropriate balance between state and federal powers originally crafted under the Federal Power Act.

Over the past five years FERC has, through various orders and now on the basis of the Supreme Court's *California* v. *FERC* decision, in effect, asserted exclusive authority to regulate all water uses associated with a FERC federally-licensed project. This is so because of the highly interdependent nature of water uses. Each water user affects the quantity and the quality of water available for other users within a river system. Further, FERC continues to work to limit state authority to certify and condition projects to meet state water quality standards and related requirements under Section 401 of the Clean Water Act. FERC's assertion of exclusive authority is unreasonable and unworkable, as explained more fully in our enclosed comments attached to this statement.

For these reasons, the Western States Water Council supports amendments to the Federal Power Act, such as those embodied in S. 106, to restore states' authority to

protect state interests in water use related to hydropower development by requiring licensees to comply with substantive and procedural state water law. This will allow states to exercise their traditional authority in making choices regarding development and quality of life priorities. This authority is increasingly important in the current era of reallocation as traditional values and demands for water are changing. These changes mean that public values are increasingly being included in state water management decision making. These public values include water quality, wetlands, endangered species, fish and wildlife resources, wilderness, instream flows, tribal rights, and conservation. Quite simply, allocation and reallocation decisions cannot be made effectively by distant federal level managers and are best made at the state and local levels.

The Council also recommends that FERC be required, prior to licensing or relicensing any project, to ensure that the project is consistent with state plans for the development, management, and protection of a waterway. The Council also believes the Federal Power Act should be amended to allow the states, if they choose, to have exclusive authority to license or permit any project or plant with a total combined generating capacity of five megawatts or less.

The Council appreciates the opportunity to testify and looks forward to working with Congress so both federal and state interests can be protected in the FERC hydropower licensing process.

[Attachment.]

POSITION OF THE WESTERN STATES WATER COUNCIL CONCERNING FEDERAL HYDROPOWER PROJECT LICENSING

WHEREAS, western states support and encourage the enactment of a balanced national energy policy, which recognizes legitimate state water management and planning authority to balance competing water uses; and

WHEREAS, differing legislation has been introduced in the Congress which would significantly affect state interests in the federal hydropower licensing process of the Federal Energy Regulatory Commission (FERC) by amending both the Federal Power Act and the Clean Water Act; and

WHEREAS, state water law and management responsibilities must be recognized and fully integrated with federal energy policy and FERC's hydropower licensing process in order to achieve the optimal development, management and protection of western water resources; and

WHEREAS, states have authority to plan, manage, balance, regulate and protect various water uses, including hydropower, while FERC, by its own admission, has no authority ". . . to 'plan' a waterway in the sense of issuing a 'plan' that determines what all the various uses of the waterway should be . . .;" and

WHEREAS, the Electric Consumers Protection Act recognizes the importance of state plans in balancing hydropower development with other uses of a waterway and environmental protection; and

WHEREAS, FERC cannot effectively make what are appropriately state and local water use decisions, nor develop comprehensive plans to balance present and future uses, nor protect hydropower development from conflicting future uses; and

WHEREAS, Congress' clear intent in the Federal Power Act regarding the appropriate relationship between federally licensed hydropower development and state water law has been muddied by narrow judicial decisions, including *California* v. *FERC*; and

WHEREAS, proposed legislation to streamline the federal hydropower licensing process would grant FERC additional powers which would further threaten legitimate state and federal interests and appropriate checks on hydropower development; and

WHEREAS, other legislation has been introduced to reaffirm Congress' deference to state authority in the administration of water rights and the regulation of water use under the Federal Power Act, and to strengthen the state role under the Clean Water Act in protecting water quality and related designated uses, as it pertains to hydropower development; and

WHEREAS, many important questions remain unanswered and the states continue to have many concerns related to the federal hydropower licensing process;

NOW THEREFORE BE IT RESOLVED that the Western States Water Council urge the Congress and the Administration to join the states and other interests in a comprehensive review of the federal hydropower licensing process in order to forge a more cooperative state and federal working relationship and optimize the beneficial use of water and power resources and protect water quality.

BE IT FURTHER RESOLVED that the Western States Water Council suggest and endorse the following:

(1) The National Energy Security Act (S. 341) should be revised to delete Section 4201, which threatens state water quality certification authority under Section 401 of the Clean Water Act, while legislation to be introduced by Senator James Jeffords to reaffirm and strengthen the states' role should be enacted;

(2) Congress should adopt amendments to the Federal Power Act that restore to the states authority over all water uses, including those related to hydropower development, while preserving the provisions of the Electric Consumer's Protection Act of 1986; S. 341 should be amended to include the amendments to the Federal Power Act embodied in S. 106/H.R. 649 in a manner which requires compliance with state law;

(3) The Federal Energy Regulatory Commission should, prior to licensing or relicensing a project, ensure that the project is consistent with state plans for the development, management and protection of a waterway; and

(4) The Federal Power Act should also allow the states, if they choose, to have exclusive authority to license or permit any project or plant with a total combined generating capacity of five megawatts or less.

Western States Water Council Comments on California v. FERC

WESTERN WATER LAW

A brief explanation of western water law is necessary as a foundation for our arguments regarding the importance of states retaining jurisdiction over all water uses, including hydropower. The appropriation doctrine is the foundation of western water law and management. During the settlement of the West, the doctrine evolved around a few basic principles, including "first in time, first in right," which was a simple queuing method of establishing water use priorities in fairness to all. Under this principle, early miners and pioneers diverted and later dammed western rivers and put the water to beneficial use. Beneficial use is another basic principle, defined by custom, which in turn defines the measure of the water right ultimately established. Another important principle prohibits waste of the resource.

As western water law has evolved, it has sought to deal with the complex task of balancing the sometimes conflicting goals of protecting both private rights and the public interest for the greater good of all. Generally speaking, state constitutions define water as public property, and private rights to its use are defined and occasionally redefined by state statutes. An application for a new use or to change an existing use must be approved by the state, generally represented by the State Engineer, after some type of public interest review, an analysis of the availability of water, and an evaluation of the potential impact on other water users and their rights.

With respect to hydropower, state law requires the right to the use of water in a stream has to be acquired under state law in the same manner as any other use. In some instances, to protect the public interest, states have subordinated hydropower development to potential future uses. As a practical matter this avoids future conflicts over minor upstream diversions. Similarly, states have required that certain amounts of water must bypass hydropower plants in order to protect downstream resources and rights.

The Supreme Court's *California* v. *FERC* decision seriously disrupts this comprehensive management system, displacing the states' authority to balance all water uses and confirming FERC's claim of exclusive authority over any water use related to or affected by hydropower development. In the words of Idaho's state engineer, FERC's control is being asserted over river basins that they have only seen on a map and the names of which they can not spell or even pronounce. This is hardly appropriate public policy and is inconsistent with tested principles of federalism, as well as the Congress' repeated deference to state water use decisions. It is particularly peculiar given the relatively small contribution new hydropower development is expected to make to our future national energy security.

PRELIMINARY PERMITS AND STATE WATER RIGHTS

Before the Supreme Court's 1946 *First Iowa* misinterpretation of Section 27 of the Federal Power Act, the Federal Power Commission and later Federal Energy Regulatory Commission deferred water use decisions to the states. That changed after the decision in *First Iowa*. Conflicts grew as a result of the emphasis on renewable energy resource development which followed the energy crisis of the early 1970's

and the thousands of preliminary permit requests filed with FERC in response to federal financial incentives for hydropower. In some cases, conflicting federal permit and state water right applications were filed.

As a result, in 1982 the Western States Water Council asked FERC to require all applicants for preliminary permits and licenses to present evidence of having filed for the necessary water rights under state law, or evidence of the ability to acquire the necessary water rights pursuant to state law. Filing for a state water right establishes a priority date (just like filing for a preliminary permit) and begins the review process by which the state engineer determines the potential effect of the proposed use on other private and pubic rights. Then FERC Commissioner Georgiana Sheldon responded, "There are no requirements . . . governing the contents of an application for preliminary permits that addresses the acquisition of water rights . . .," and the proposed requirement that an applicant, ". . . investigate the availability of water rights prior to the issuance of a permit would be premature."

The Western States Water Council proposed legislative amendments to the Federal Power Act to require FERC permit and license applicants to comply with state water law, and in 1983 adopted a detailed resolution explaining the states' concerns. These concerns were submitted for the record during testimony before the House Energy and Commerce Committee's Conservation and Power Subcommittee on September 11, 1984.

INSTREAM FLOWS

The Western States Water Council first addressed the issue of instream flows and FERC licensing with a formal position in 1980. The U.S. Fish and Wildlife Service sought to have FERC require significantly higher continuous water releases, under the terms of a federal hydropower license for Morris Shepherd Dam and Lake Possum Kingdom on the Brazos River in Texas. Of note, the natural flow of Brazos varies from zero to 81,700 cubic feet per second (cfs). The primary purpose of the project is to provide a dependable water supply for irrigation, industrial and municipal use. The dam is owned and operated by the Brazos River Authority, an agency of the State of Texas. Texas objected to the requested releases as an infringement upon its sovereign rights.

In part, the position adopted by the Western States Water Council urged FERC to deny the request for increased flows as it "would constitute an unwarranted intrusion into a recognized area of state responsibility . . . contrary to the express policy of the President and the intent of the Congress. . . ." After nearly ten years of negotiation, an acceptable compromise was reached which protects the projects safe yield, while increasing downstream releases, within state law. However, the relicensing controversy in this and other cases has dissuaded other Texas river authorities from seeking a federal hydropower license, actually discouraging development of this renewable resource.

Thereafter, Congress enacted the Electric Consumers Protection Act of 1986 and strengthened fish and wildlife protections (and required consideration of comprehensive state water plans). On the Senate floor, Max Baucus of Montana withdrew amendments to the Federal Power Act (as proposed in 1982 by the Western States Water Council) in return for a promise to hold hearings on state concerns. On September 12, 1986, the Council presented testimony before the Senate Energy and Natural Resources Committee, along with the states of Arkansas, California, Idaho, Maine, Montana, Ohio, Oklahoma, Oregon, Virginia, and Washington. Shortly thereafter, ECPA was enacted.

On March 11, 1987 FERC issued a declaratory order for the *Rock Creek* project beginning the process which led to the Supreme Court's *California* v. *FERC* decision. The *Rock Creek* order said: "The imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process. . . . As such, the establishment of minimum flows is a matter beyond the reach of state regulation. Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing, such as fishery protection and project economics, and would essentially vest a veto authority over projects in the states." FERC thus asserted exclusive jurisdiction over downstream water releases. Citing *First Iowa*, FERC's *Rock Creek* order stated that Section 27 ". . . only establishes a right of compensation for vested water rights taken by a Commission licensee."

FERC did not see fit prior to or after issuing its order to directly address its decision to the California State Water Resources Control Board, which had ordered greater minimum flow releases. The Board received the order four days after it was rendered as part of a regular informational mailing. Though not a party to the *Rock*

Creek proceedings, California petitioned FERC for a rehearing, which FERC denied some five months later. By then, California had already taken the case to a federal district court. The suit reached the 9th Circuit Court on December 21, 1987, and the U.S. Supreme Court later accepted certiorari at the request of California and 49 other states, which also filed a joint amicus brief. The Supreme Court rendered its decision on May 21, 1990. Again, in our view, this decision fails to follow clear Congressional intent regarding federal and state regulation of hydropower and its effects on other water uses.

SUBORDINATION

About this same period of time, a serious controversy arose in the State of Idaho. A ratepayer group brought suit against Idaho Power for failing to protect its rights (which were thought to be subordinate under state law) to the flows of the Snake River for power purposes at Swan Falls. As a result, some 5,000 upstream water users were named as defendants and the state stopped processing new water rights applications within the Snake River Drainage. After years of negotiation, on October 1, 1984, the State of Idaho (with the approval of the Governor, the Idaho Attorney General, and the Legislature) reached an negotiated agreement with Idaho Power and other interests, then asked FERC to incorporate the terms of the settlement the Swan Falls Project license. For years FERC did not, until it was ultimately forced to do so by an act of Congress.

Meanwhile, on July 30, 1986, FERC issued an order granting the Boise Cascade Corporation a license for the 9.5 megawatt Horseshoe Bend hydroelectric project. Given Idaho's experience with the Swan Falls Project, the state issued a water right requiring subordination to future upstream uses, and asked FERC to so condition the license. FERC responded, "The condition would . . . in essence vest in it [the Idaho Department of Water Resources], rather than the Commission, ultimate control over operation and continued viability of the project. . . ." A footnote referred to the Supreme Court's *First Iowa* decision. From the states' point of view, FERC presumes to usurp control over all future diversions upstream of Horseshoe Bend, or indeed upstream of any FERC-licensed project on any stream in the country.

On March 5, 1988 FERC rejected an appeal by the Montana Department of Natural Resources and Conservation of an order amending the license for Montana Power Company's Milltown Dam Project. Montana had requested the license be conditioned to subordinate hydropower use to projected upstream consumptive uses equivalent to 11,032 acres of irrigation, which was a minimum level of expected future development. Montana estimated the impact on power production as less than one half of one percent. FERC denied Montana's request, without any explanation, referring to its Horseshoe Bend order.

VESTED PROPRIETARY WATER RIGHTS

Two more recent FERC decisions, one before and one after the Supreme Court's *California* v. *FERC* decision, illustrate our growing concern over the Commission's attitude regarding state water law. On April 30, 1990, FERC issued an order allowing Montana Power Company to expand its Thompson Falls Project. The Montana Department of Natural Resources and Conservation intervened and recommended a condition requiring the company, prior to construction and operation of the project, "shall comply with the requirements of the laws of the State of Montana with respect to the appropriation, diversion and use of water for the purposes for which the license amendment is issued."

The Commission rejected the request stating, "Based on a review of the agency and public comments filed in this proceeding and on our independent analysis, the expanded Thompson Falls Project is best adapted to a comprehensive plan for the water resources of the Clark Fork River. . . . The Commission . . . has decided on the amount of additional diversion for the Thompson Falls Project in the context of its balancing responsibilities. . . . The only matter left to be resolved is whether the licensee could obtain the additional diversion rights by negotiations or by condemnation proceedings under Section 21. . . ." This order is particularly disturbing. It raises the threat of condemnation and places a cloud of uncertainty over all water rights within any basin where there is a federally licensed hydropower project.

The second order, issued on June 14, 1990 was similarly disturbing. The Commission granted a minor license to Marsh Valley Hydroelectric Company for a project on the Portneuf River in Bannock County, Idaho. Downstream irrigation interests intervened and asked that the license be conditioned so as to not interfere with their prior vested water rights during the irrigation season. However, the Commission stated that the irrigators filed no evidence that the project would interfere with

their rights, and therefore, there was no reason or basis on which to condition the license. An accompanying footnote added, "If a petitioner files with the Commission substantiation of the nature of the project's conflict with other uses on the waterway, we could consider the issue under our general reserved authority . . ., pursuant to which we could require the licensee to reasonably reduce its use of water for generation if, after consideration of all aspects of the public interest, including the need for the water for irrigation and the impact of such diversion on project generation, finances, and environmental protection measures, we conclude that it would be in the public interest to accommodate such diversions." Again the Commission referred to its Horseshoe Bend order. FERC would thus totally usurp the states' role in balancing all water uses affected by hydropower development and in protecting other water rights potentially affected by the project.

Is it the Congress' intent, as FERC asserts, that the role of the states in regulating hydropower development be limited simply to determining what private proprietary water rights exist to facilitate federal condemnation proceedings? Is this the meaning of Section 27? If Western congressmen had any idea such an interpretation would be possible in the future, the Federal Power Act would have never been enacted.

STATE WATER PLANNING AND COMPREHENSIVE WATER PLANS

On December 19, 1986, shortly after ECPA was enacted, FERC issued an order amending a license for the Fieldcrest Mills Project in Georgia. In addressing the new requirement to consider state comprehensive plans under Section 10(a)(2), the Commission unilaterally defined such plans as requiring the balancing of competing uses of a waterway, based on a states own data and applicable policy considerations, after considering all relevant public uses. Further, FERC stated such plans should be prepared and adopted pursuant to a specific act of the state legislature and developed, implemented and managed by an appropriate state agency. In a subsequent letter to the governors dated January 14, 1987, from the Director of the Office of Hydropower Licensing, FERC asked states to provide any comprehensive plans, as well as the names of appropriate contact persons within thirty days. States find it ironic that FERC, which has no similar comprehensive planning authority, would be so presumptuous as to define what it would accept as a state's comprehensive plan.

On July 9, 1987, FERC Chairwoman Martha Hesse testified during a renomination hearing before the senate Energy and Natural Resources Committee that the Commission ". . . has no authority . . . to 'plan' a waterway in the sense of issuing a 'plan' that determines what all the various uses of the waterway should be." In response to questioning, Chairwoman Hesse also stated FERC had received twenty-six letters with twenty-one state plans that had been submitted for review as "comprehensive." The Commission had identified only the Northwest Power Planning Council's 1986 Northwest Conservation and Electric Power Plan, and the 1984 Columbia River Basin Fish and Wildlife Program as qualifying plans under Commission orders.

On October 26, 1987, FERC promulgated its Fieldcrest Mills order defining state comprehensive plans, which was published as interpretive guidance, precluding any opportunity for comments by the states. FERC also noted many of the plans submitted in response to its request lacked substantial technical evidence required to "fully understand or independently confirm the state's conclusions." Still the Commission offered to consider any "plan," or any other relevant study or recommendations as part of its public interest analysis. FERC later dropped its limited definition, and basically accepted anything submitted as a "plan," though stating its decisions were not bound by any state plan. Western states argue FERC is not a planning agency, and has neither the inclination, nor ability to prepare comprehensive river basin plans and should not be allowed to second guess state planning decisions. Rather, FERC should ensure federally licensed projects are consistent with state plans for the development, management and protection of a waterway.

The Sayles Flat project is also noteworthy. On March 18, 1988 the 9th Circuit Court of Appeals vacated the project license in the *La Flame* case after the court found FERC failed to examine the project's recreation and aesthetic impacts and neglected to prepare either an environmental assessment or a finding of no significant impact. The court rejected FERC's contention that it had satisfied the Federal Power Act's comprehensive planning provisions, which require the coordinated study of an entire river system before hydroelectric projects are authorized. The court stated that at no point was reference made to the entire water system, to the Sayles Flat Project's impact on other projects in the basin, or to any other project's impact on the Sayles Flat Project.

Other orders issued by FERC demonstrated a continuing disregard for state concerns and from a state point of view, contempt for state responsibilities and authority.

STATE WATER QUALITY CERTIFICATION

On February 11, 1987, FERC issued Order No. 464 (promulgated as a final rule on February 23) waiving state water quality certification requirements under Section 401(a)(1) of the Clean Water Act for some 227 projects in 32 states. FERC unilaterally redefined the one-year period within which the state certifying agency must process a request as beginning on the date of receipt of the request, rather than the customary date on which a complete application was submitted. FERC applied Order No. 464 to all pending applications and retroactively waived the certification requirement, then offered to consider for inclusion in a license any water quality conditions recommended by the certifying agency. However, few states responded as FERC had already waived the means by which states could require the information necessary to make such recommendations.

Of particular note, the initial notice of proposed rulemaking for Order No. 464 contained no provision addressing its possible retroactive application. Publication of the final rule foreclosed any opportunity for state comment on this issue. Moreover, FERC failed to notify states of the impact of the order until April 2, well after expiration of the period allowed for timely request for rehearing. Once the effect of Order No. 464 was apparent, Alaska, California, Maine, New York and Washington protested, and petitioned for rehearing, which was denied by FERC as untimely.

In the *City of Fredericksburg* v. *FERC* case decided by the 4th Circuit Court of Appeals on June 12, 1989, the court vacated the license FERC granted for construction of a powerhouse on a dam owned by the city across the Rappahannock River in Virginia. FERC had waived the state's 401 certification requirement under Order No. 464 for not acting within the one-year period as required. Virginia had not received what it considered to be an appropriate and complete 401 application.

The court found Commonwealth Hydroelectric, Inc. (CHI) never made a valid "request," specifically stating that its holding rested on violation of FERC's own regulations, which require a prospective licensee to demonstrate compliance with state certification requirements by filing with FERC either a copy of the certification or a "copy of the request for certification, including proof of the date that the certifying agency received the request in accordance with applicable law governing filings with that agency." The court found that by allowing states to prescribe the method of filing certification requests, ". . . the regulation also aids the states in obtaining the information necessary to act on requests from prospective licensees."

Concern over FERC's waiver of state certification authority led both the House and Senate to pass legislation in 1988 to redress the problem, but the session ended without a conference to resolve differences in the two bills. At that time, Rep. John Dingell, Chairman of the House Energy Committee explained, H.R. 2020 ". . . failed largely because the Congress ran out of time." He added, "I am particularly troubled with the Commission's actions regarding the retroactive application of Order Number 464. . . . I am also troubled that FERC decided on procedural grounds to dismiss the petitions of some states for reconsideration. Again, I believe the Commission overreacted. strongly urge that the new Commission quickly reexamine the retroactive issue and its impact." The Commission, with several new members, did reexamine the order and found it to be "legal," then voted to let it stand despite the Congress' and state's concerns. FERC's apparent total disregard for state authority can only complicate and delay reasonable development.

FEDERAL/STATE COOPERATION

On February 25, 1988, the Western States Water Council wrote FERC Chairwoman Martha Hesse highlighting our concerns and intergovernmental conflicts. We referred to the President's Executive Order Number 12612 on federalism, and expressing the view that rather than cooperate with the states, FERC appeared to have adopted an attitude of confrontation. In response, FERC wrote, "In hydroelectric matters the Commission is in large measure a reactive body, in that it responds to the applications for hydroelectric licenses that are filed. . . . The Commission's interpretation and application of the Federal Power Act (FPA) as it relates to use of commerce clause waters has been essentially unchanged over the years. The Commission articulated its position again in *Rock Creek* . . . noting that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a)(1) of the FPA are preempted thereby." The Council believes that its con-

tinuing calls for cooperation have consistently been similarly disregarded by the Commission.

During a FERC budget hearing before the Senate Energy Committee, on March 3, 1988, Senator James McClure took the opportunity to express his concern to FERC Chairwoman Martha Hesse stating, "Congress did not vest FERC with the role of the central planner of water uses, and we will not sit still if you seek to do so. If through some quirk of a court decision you are successful in your efforts to seize control over water rights, then I strongly suspect the Congress will revisit this issue. I know what the Supreme Court said in *First Iowa* and subsequent cases . . . but when you assert, as you have, that once a federal license is issued on any water project you then have exclusive control over every water upstream from that federally-licensed project, you declare war on the West . . . and we will all be losers."

In summary, major state concerns involve preliminary permits and state water rights, instream flows and the determination of minimum bypass flows, the subordination of hydropower development to other uses, protection of prior vested proprietary water rights, state water planning and comprehensive water plans, determination of water quality related license conditions, and FERC's general lack of cooperation and attention to state concerns.

Senator BRADLEY. Thank you very much, Mr. Bell.

Mr. McSparran.

STATEMENT OF JOHN McSPARRAN, DIRECTOR, BUREAU OF WATER RESOURCES MANAGEMENT, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ON BEHALF OF THE INTERSTATE COUNCIL ON WATER POLICY

Mr. MCSPARRAN. Thank you, Senator Bradley.

I would like to make the official statement part of the record.

Senator BRADLEY. Your statement will be in the record.

Mr. MCSPARRAN. I am here to represent the Interstate Council on Water Policy, which is the independent national association of State, interstate, and regional water administrators concerned with water planning, quality, management, conservation, and development. Since 1959, ICWP has been the voice of State water management concerns, particularly with regard to the relationship between State and Federal Governments' regulatory authority and information exchange.

The ICWP supports the amendments to the Federal Power Act which would restore balance between Federal and State interests and protect States' fundamental right to manage the waters of their State. We feel that S. 106 would preserve the legitimate and recognized interests of the Federal Government in hydropower development and would maintain the current licensing framework for hydropower facilities.

None of FERC's current responsibilities under the Federal Power Act would be obviated. The language would clarify and affirm that all procedural and substantive requirements of State water law are to be respected in the Federal licensing process.

Now, some specific recommendations that we would recommend. First, this is not just a western water rights issue. We would recommend to amend sections 9 and 27 of the Federal Power Act to assure that FERC licensees comply with both procedural and substantive requirements of State law. Recent court decisions have made such actions necessary if States are to effectively maintain the ability to protect environmental and recreational uses.

While the language proposed in S. 106 would address this concern with regard to water rights administered by western States, ICWP recommends that S. 106 be expanded to include protection

for a broader range of State laws related to water resources. States not governed by appropriation water law, such as Pennsylvania, may have other laws affecting water management that must be adhered to as well.

Therefore, ICWP recommends that the language which S. 106 proposes as an amendment to section 27 read as follows: "No license granted pursuant to this act shall exempt any licensee or applicant for a license from complying with all procedural and substantive requirements of the laws of the State in which the project is located with respect to any"—and here is the addition—"water use or water quality protection laws and any water rights," that insertion.

Second, amend section 21 of the Federal Power Act to clarify that States have primary authority over State-owned property. Recent actions by FERC in issuing a license to a private entity to develop a hydroelectric project at Nockamixon State Park in our State underscores the need to further amend the Federal Power Act.

In that case, FERC went so far as to purport to allow the licensee to condemn the State-owned dam, park land, and the waters and then convey those interests to a third party for whatever they wanted to use it for.

The Federal Power Act should be amended to exempt State-owned or controlled lands from the right of the licensee to exercise the power of eminent domain. This could be accomplished by inserting the following language in section 21 of the Federal Power Act, where it states: "When any licensee cannot acquire by contract or by pledges an unimproved dam site or the right to use or damage the lands or property of others"—and then insert—"except lands or improvements owned or controlled by a State."

Senator BRADLEY. Mr. McSparran, your time is up. Can you take ten seconds.

Mr. MCSPARRAN. The other two things that we wanted to do was to modify the Clean Water Act and also we support the 5 megawatt exemption; let the States handle those cases.

Thank you.

[The prepared statement of Mr. McSparran follows:]

PREPARED STATEMENT OF JOHN MCSPARRAN, DIRECTOR, BUREAU OF WATER RESOURCES MANAGEMENT, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ON BEHALF OF THE INTERSTATE COUNCIL ON WATER POLICY

The Interstate Council on Water Policy (ICWP) is the independent national association of state, interstate, and regional water administrators concerned with water quantity and quality management, conservation, and development. Since 1959, ICWP has been the voice for state water management concerns, particularly with regard to the relationship between state and federal programs, regulatory authority, and information exchange. ICWP is firmly committed to building and maintaining a strong and viable federal-state partnership in water resource management. It is precisely because of ICWP's dedication to this partnership philosophy that the organization and its individual members are so deeply concerned about continuing conflicts between state and federal responsibilities in the licensing of hydropower facilities. ICWP supports amendments to the Federal Power Act which would restore the balance between federal and state interests and protect states' fundamental right to manage the waters of their state.

HYDROPOWER DEVELOPMENT AND STATE WATER RESOURCE MANAGEMENT

Hydropower siting and licensing decisions are currently being made by the Federal Energy Regulatory Commission (FERC) with blatant disregard for some aspects of state water law. Under current law, FERC grants permits for development of a hydropower project to a party which has not obtained a state water right in those states with a permit system. Indeed a license can be granted for a project on a river which has been fully allocated among current users, thus forcing those users to relinquish their vested property rights. This situation is not merely the result of a lack of coordination or cooperation between state and federal agencies, but amounts to a federally prescribed preemption of state authority.

FERC licensing procedures may also frustrate states' water management and regulatory responsibilities by imposing conditions on the permit or license in disregard of state law. In some cases, state law is circumvented by failure to consider state-mandated instream uses when imposing minimum instream flows below the dam. In other cases, FERC actions totally disregard the state reservation process including the legal enforcement means. These examples of how the Federal Power Act serves to thwart state water law are not merely hypothetical illustrations. Many states have encountered very real and fundamental conflicts with federal hydropower licensing of projects.

Hydropower development is governed by a complex regulatory system which centralizes authority in the Federal Energy Regulatory Commission (FERC). While there is an unquestionable national interest in energy security and the protection of interstate commerce and navigable streams, federal authority over hydropower need not and should not preempt state water management responsibilities, particularly in river systems where the federal interest in navigation does not exist. In recognition of the differing hydrologic and climatic conditions and varying water demands and uses, states have designed water management and allocation systems which address their unique needs in balancing competing uses and protecting their water resources. State water laws are in effect to allocate uses of water in many states. Other states have developed state water plans to guide the management of water use and the relationship between quality and quantity. State plans and regulatory systems of many states are designed to address a broad spectrum of water uses including municipal and industrial water supply, irrigation, recreation, flood control, fish and wildlife, and hydropower. In contrast, FERC has neither the capacity nor the inclination to comprehensively evaluate the water resource conditions of a given river system or the needs of the state's citizens.

Water uses are highly interdependent, each water use having an impact on both the quality and quantity of water available for other uses in a river system. Hydropower facilities are but one aspect of this delicate balance. It is certainly not clear why a federal energy development agency (namely FERC) is best positioned or qualified to make decisions that can so profoundly affect a broad range or water uses and needs. This deference to federal authority in hydropower is particularly peculiar given the fact that hydropower contributes only minimally to national energy security with most hydropower facilities providing less than five megawatts. Recent estimates suggest that only five percent of this country's total electricity generation is provided by hydropower under FERC's jurisdiction.

The responsibility for balancing competing interests and evaluating the complex hydrologic systems that impact both present and future water use rests squarely with the states. Amendments to the Federal Power Act, passed in 1986, require FERC to consider the public interest associated with other water uses such as fish and wildlife, irrigation, flood control, and water supply and to consider comprehensive state water plans. However, FERC has not demonstrated an ability to comprehensively evaluate river system needs nor a commitment to ensure that its decisions are consistent with state water plans. More importantly, the 1986 amendments are simply no substitute for requiring compliance with state water law.

It is important to note that the concern over preemption of state water law and management responsibility is certainly not peculiar to the western states which operate under the appropriation doctrine. Indeed, 49 states joined in an amicus brief in the recent *California* v. *FERC* case. States throughout the nation have sovereign authority over state waters and have been vested with responsibility for its use, conservation, and development. States, such as Pennsylvania, which own and operate dams have had FERC permits issued to private developers at those sites in complete disregard to the rights of the state as proprietor. States, such as Oklahoma, have found their state-designated scenic rivers threatened by hydropower impoundments sanctioned by FERC despite state law protecting those rivers. States, such as Arkansas, are finding their plans to provide water for irrigation jeopardized by potential

hydropower development authorized by FERC. In short, the implications of the federal disregard of state water law in hydropower licensing are widespread and pervasive. State water law, as well as state water planning and management efforts, can and have been thwarted by FERC hydropower licensing actions across the country. States in different parts of this nation face very different sorts of water concerns and have evolved state water management approaches and legal frameworks uniquely suited to their needs. However, states share a very fundamental concern about federal actions which fail to recognize state law and state water management responsibilities.

DEFERENCE TO STATE LAW IN THE FEDERAL POWER ACT

Two sections of the 1920 Federal Power Act specifically address the relationship between federal hydropower licensing and state water law. Section 9(b) requires that license applicants submit to FERC

> satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

More importantly, the Section 27 savings clause provides that

> nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The legislative history of Section 27 clearly reveals a careful and deliberate attempt by Congress to preserve traditional state powers over water rights. Indeed, prior to 1946, FERC's predecessor, the Federal Power Commission, consistently maintained that federally-licensed hydropower projects must fully comply with state laws. It has been only recently, presumably in response to federal financial incentives for hydropower and increased emphasis on renewable energy development, that an increasing number of conflicts between FERC licensing and state water management decisions have arisen.

While the Federal Power Act was crafted in recognition of the responsibility of the federal government to preserve and promote navigation and interstate commerce, it was also explicitly designed to protect the traditional federal deference to state regulation and control of water.

INTERPRETATION OF THE COURTS

The Courts have chosen to narrowly interpret deference to state water law in the Federal Power Act. The pivotal case in this regard was *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*. In this 1946 case the Supreme Court interpreted the Federal Power Act as preempting non-proprietary state water laws in hydropower licensing. The Court's reasoning was based on a broad reading of the procedural requirements of Section 9 and a narrow interpretation of the meaning of irrigation, municipal, or other uses in Section 27.

Last year the Supreme Court revisited this issue in *California* v. *Federal Energy Regulatory Commission* by affirming a Ninth Circuit Court decision regarding the State of California's attempt to set minimum flow rates for the Rock Creek hydropower project. The Supreme Court explicitly rejected California's request, supported by an amicus brief filed by the 49 other states, that it overturn *First Iowa's* interpretation of the Section 27 savings clause. In so doing, the Court acknowledged that the statute's language presented a "close question," but declined to reexamine the legislative history and instead deferred to the understanding of Section 27 set forth in *First Iowa*.

The Court's decision and FERC's subsequent implementation of that decision are adversely affecting the ability of the states to manage their water resources and safeguard fish and wildlife and recreational resources. The states continue to maintain, as they did in the *California* v. *FERC* amicus brief, that "Section 27 is not limited to protection of proprietary rights, but instead recognizes full state regulatory authority over all aspects of water rights" and that in drafting the Federal Power Act, "Congress recognized that states were in the best position to effectively balance the competing uses of water and allocate water among those uses in accord with the public interest."

NEED FOR CONGRESSIONAL ACTION

The recent Supreme Court decision in the *Rock Creek* case demonstrates the need for Congress to reaffirm its original intent to defer to state water law in the Federal Power Act. Because the Court in 1946 construed the language of the Federal Power Act so narrowly as to preempt state law in many important respects and because in May 1990 the Supreme Court declined to reverse the 1946 decision, Congress must now act to remedy the imbalance. Indeed, the Supreme Court noted in *California* v. *FERC* that it was obliged to bind itself to "long-standing and well-entrenched decisions," arguing that it is better that a rule of law be settled than it be settled correctly. The Supreme Court clearly invited Congress to clarify its intent regarding states' authority. While states could continue to seek recognition of their water laws in hydropower licensing through the judicial system, in the hope that the narrow focus of legal arguments will eventually lead to sound public policy, Congress can intervene to avoid any future ambiguity by clarifying that the Federal Power Act be administered in deference to aspects of state water law.

In essence, this is what S. 106 is intended to accomplish. The amendments to the Federal Power Act which are embodied in S. 106 are not designed to alter what is recognized by many as the original intent of Congress in the 1920 Act. S. 106 would preserve the legitimate and recognized interests of the federal government in hydropower development and would maintain the current licensing framework for hydropower facilities. None of FERC's current responsibilities under the Federal Power Act would be obviated. However, the language would clarify and reaffirm that all procedural and substantive requirements of state water law are to be respected in the federal licensing process.

ICWP'S RECOMMENDATIONS

To restore the appropriate balance with regard to state and federal interests in hydropower licensing, the Interstate Council on Water Policy offers the following recommendations:

- Amend Sections 9 and 27 of the Federal Power Act to assure that FERC licensees comply with both procedural and substantive requirements of state law. Recent court decisions have made such action necessary if states are to effectively maintain the ability to protect environmental and recreational uses. While the language proposed in S. 106 would address this concern with regard to water rights administered by western states, ICWP recommends that S. 106 be expanded to include protection for a broader range of state laws related to water resources. States not governed by appropriation water law my have other laws affecting water management that must be adhered to as well. Therefore, ICWP recommends that the language which S. 106 proposes as an amendment to Section 27 of the Federal Power Act be further amended by adding the following italic phrase:

  ". . . no license granted pursuant to this Act shall relieve any licensee or applicant for a license from complying with all procedural and substantive requirements of the laws of the State in which the project is located with respect to any *water use or water quality protection laws and any water* rights needed for such project . . ."

- Amend Section 21 of the Federal Power Act to clarify that states have primary authority over state-owned property. Recent actions by FERC in issuing a license to a private entity to develop a hydroelectric project at the Nockamixon State Park Dam in Pennsylvania underscore the need to further amend the Federal Power Act. In that case, FERC went so far as to purport to allow the licensee to condemn the state-owned dam, park land, and waters, and then convey interests in those properties to third parties. The Federal Power Act should be amended to exempt state-owned or controlled lands from the right of the licensee to exercise the power of eminent domain. This could be accomplished by inserting the italic phrase in Section 21 of the Federal Power Act:

  When any licensee cannot acquire by contract or by pledges an unimproved dam site or the right to use or damage the lands or property of others *except lands or improvements owned or controlled by a state* necessary. . . .

  In addition, the language which S. 106 proposes as an amendment to Section 9(a) of the Federal Power Act could be further amended by adding the italic phrase:

". . . with respect to the acquisition of water rights and administration of the use of water *and the ownership, use, control or management of lands or improvements owned or controlled by a state.*"

- Modify Section 401 of the Clean Water Act to make it clear that States have primary authority and responsibility to protect water quality. Such an amendment has been offered by Senator Jeffords (S. 812) to clarify that Section 401 certification extends not merely to discharge of pollutants, but to any discharge from a hydropower project that might result in water quality degradation or impairment of designated uses recognized under state law.
- Amend the Federal Power Act to exempt hydro projects with capacities of five megawatts or less from the provisions of the Federal Power Act if the state can demonstrate its capacity to assume regulatory responsibility. (Such a strategy is proposed in S. 341.) This system would insure that particularly small projects could be balanced by the state with respect to other river system uses. Given the fact that such small projects clearly contribute little to this country's total energy needs, the overriding federal interest is minimal and FERC would be relieved of a large portion of its licensing workload.

The Interstate Council on Water Policy (ICWP) appreciates the opportunity to offer its views on the need to amend the Federal Power Act. ICWP's members from across the nation urge the Subcommittee to support S. 106.

Senator BRADLEY. Thank you very much.
Mr. Fraser.

STATEMENT OF JOHN P. FRASER, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, ASSOCIATION OF CALIFORNIA WATER AGENCIES, SACRAMENTO, CA

Mr. FRASER. Thank you. Mr. Chairman and members: I am very pleased to be here today to testify in opposition to Senator Craig's bill. We certainly do not want that to be any reflection on the respect and admiration we have for the Senator, however, and his work on western water matters.

The Association of California Water Agencies, which we refer to with the acronym "ACWA," is a State-wide association of 400 municipal, agricultural water agencies within the State of California. They are responsible for about 90 percent of all the industrial, agricultural, and municipal water that is delivered within the State.

In addition to providing water supply, our members are also responsible for the generation of substantial amounts of electric power. In fact, our members now hold FERC permits—licenses, I should say rather, for 24 hydroelectric projects representing approximately 3300 megawatts. There are two licenses presently before FERC for an additional 230 megawatts of capacity.

Our association is committed to the continued development of the State's water resources to provide enough water to meet existing and future needs. It is our policy that such development must be balanced with consideration for and protection of existing water rights, as well as fish and wildlife needs and other beneficial uses.

In the pursuit of such balanced development, the association believes that multi-purpose projects are preferable. Such projects better utilize scarce reservoir sites and limited public funds and provide the benefits of water supply, power generation, fish and wildlife mitigation, water quality enhancement, recreation, and flood control.

In order to develop these projects, however, our members require a high degree of certainty with respect to the establishment of those water rights to provide the security necessary for adequately financing these projects. We are committed to maintaining the sta-

bility of the California water rights system and a State regulatory system that foster the continued operation and development of multipurpose projects.

In my testimony today, we are in the water business in California in the front line of providing the people and the farms in California with meeting water needs and with electric, hydroelectric projects. In our opinion, the system is not broke and we really do not believe that S. 106 would do anything other than cause our members a great deal more uncertainty in the process.

S. 106 is a solution that has destabilizing effects that would undermine the ability of our members to continue to operate and develop hydroelectric projects that provide power to California. Our experience in California has been that the existing allocation of State and Federal authority over the licensing of projects, hydroelectric projects, adequately provides the certainty we require with respect to the establishment and preservation of water rights.

In reliance on State law, our members acquire any necessary water rights for project operation. The right to generate power and the conditions attached to that use remain within the purview of FERC, and that is where we would like it to remain.

Our members also hold substantial water rights for consumptive uses, such as irrigation and municipal water rights. The hydroelectric licensing authority exercised by FERC has not infringed or compromised these existing consumptive rights.

The issue here, I submit, is not the sanctity of State water rights, but who will have the authority to approve and condition the use of water at hydroelectric projects. We believe that FERC, as the Federal agency with the congressional mandate to consider and balance all competing public interests, is best equipped to render such decisions.

The necessarily parochial and limited nature of State water rights authority does not and cannot encompass the broad array of public interest factors that must be considered in a decision to license a hydroelectric project. Here Senator Hatfield certainly made a point speaking to the regional impact of many of the hydroelectric projects.

Senator BRADLEY. Mr. Fraser, if you could finish up in 15 seconds.

Mr. FRASER. Yes, sir, I can do that.

S. 106 would grant unlimited State authority to condition any water right or use at a hydroelectric project. This uncertainty jeopardizes the benefits of continued operation of existing projects, and we would ask the committee not to act favorably on S. 106.

[The prepared statement of Mr. Fraser follows:]

PREPARED STATEMENT OF JOHN P. FRASER, EXECUTIVE DIRECTOR AND GENERAL MANAGER, ASSOCIATION OF CALIFORNIA WATER AGENCIES, SACRAMENTO, CA

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to testify with respect to the amendments to the Federal Power Act proposed by S. 106.

My name is John P. Fraser. I am Executive Director and General Counsel of the Association of California Water Agencies (ACWA), a position I have held for the past 19 years. My responsibilities include directing the legislative efforts of ACWA and I am testifying today on behalf of the Association.

ACWA is a statewide organization consisting of more than 400 public water agencies located throughout the State of California. Formed in 1910, it is now the largest coalition of water agencies in the country. These public agency ACWA members, which include irrigation districts, county water districts, municipal water districts, California water districts and special agencies, are responsible for about 90 percent of all industrial, agricultural and municipal water deliveries in the state. These water deliveries are essential to the continued cultivation of nearly 10 million acres of land used for agriculture.

ACWA members not only provide the majority of all industrial, agricultural and municipal water deliveries, but also are responsible for the generation of substantial amounts of electric power in the State of California. ACWA members hold licenses issued under the Federal Power Act for 24 hydroelectric projects that provide a total of approximately 3,300 MW of generation capacity. Further, ACWA members currently have 2 license applications pending before the Federal Energy Regulatory Commission ("FERC") for projects which would provide an additional 230 MW of generation capacity for the state.

As set forth in "Water for All Californians," adopted by the members of ACWA in November 1988, it is the governing policy of the Association to:

> . . . support[] the continued development of the State's water resources, the pursuit of measures to maximize the efficiency of existing water systems and management programs, the expansion of reclaimed water projects, and the construction of additional projects to provide enough water to meet existing and future needs. . . . ACWA also believes that such continued development must be balanced with consideration for and protection of existing water rights, area of origin rights, fish and wildlife needs, and other beneficial uses.

In its effort to continue the balanced development of California's water resources, "ACWA believes that multipurpose projects are preferable, in general, to single-purpose projects. . . ." Multipurpose projects better utilize scarce reservoir sites and limited public funds and provide the benefits of water supply, power generation, fish and wildlife mitigation, water quality enhancement, and recreation in addition to flood protection. In order to develop such projects, however, a "high degree of certainty is required in the establishment of water rights in order to provide the security necessary for adequate financing of required development." Thus, ACWA is committed to maintaining the stability of the California state water rights system and a state and federal regulatory system that fosters the continued operation and development of multipurpose projects.

On behalf of ACWA, I am testifying today to tell you that those of us in the water community who are on the front line, meeting the water needs of our customers and developing water supply and electric generation projects, oppose S. 106. The system is not "broke" and—however well intentioned—the legislative proposal embodied in S. 106 is a solution looking for a problem. More important, the S. 106 "solution" is fraught with destabilizing effects that would undermine the ability of our membership to continue to operate and develop hydropower projects that provide power and badly needed revenues for water supply projects throughout the state of California.

First, I would like to address our experience in California under the existing allocation of state and federal authority. To date, our need for certainty in the establishment and preservation of water rights has been adequately addressed. Under this system, ACWA members developing hydroelectric projects have proceeded in compliance with state law to acquire any water rights necessary for project operation. We rely on state law for the creation and acquisition of these rights. The right to generate electricity and the conditions attached to that use of water remain within the purview of the FERC under the Federal Power Act.

Whether or not they are developing hydroelectric projects, our members also hold substantial water rights under state law for consumptive uses such as irrigation and municipal water needs. The protection of these existing consumptive rights is, needless to say, critical to our members' water supply mission. In this regard, it is important to note that the hydroelectric project licensing authority exercised under the Federal Power Act has not infringed or compromised these existing consumptive rights.

So, one must ask, where is the problem? Where is this offense to states' prerogatives that has so aroused at least representatives of state government? I respectfully submit that the real issue at hand does not involve the sanctity and stability of state water rights. Rather, the issue underlying this debate is whether state water rights authorities should have the power to veto federally licensed hydroelectric projects. Stated more specifically, the issue is whether the merits of a particular hydropower development proposal and the water use conditions that should be at-

tached to the development of that water resource should be determined by state water rights authorities, or whether the power to set such conditions should be vested in a federal agency with a mandate to consider and balance all competing public interests regarding such a project.

Turning to the revised allocation of state and federal authority proposed under S. 106, this legislation would create unlimited state authority to condition any water right or water use at a hydroelectric project. This would thus assure that any condition imposed by state water rights authorities for fisheries purposes, for example, would override any conflicting FERC condition. This would prevent situations such as arose in the *Rock Creek* case, where the State of California's attempt to impose higher in-stream flow requirements to benefit the fishery was overruled by FERC (and sustained by the Supreme Court) in light of the unacceptable consequences for that project's economics.

The necessarily parochial and limited nature of state water rights authority is inherently ill-equipped to consider the broad array of factors that is involved in a decision to license a hydropower project. Where in the State's substantive requirements with respect to water rights and the use of that water will adequate consideration be given power supply and energy consumer interests? How will state authority take into account the regional interstate aspects of power supply and coordination? Even if state water rights authorities could overcome statutory and constitutional constraints on the scope of their authority, are the resources available to adequately staff and implement this expanded authority? I submit that state authority does not, and cannot, adequately encompass these necessary considerations in hydroelectric licensing decisions.

Currently, under Section 10(a) of the Federal Power Act, the conditions of any license must be consistent with the comprehensive development standard, which requires FERC to consider and balance all competing uses of the waterway, including development as well as environmental and conservation concerns. I have seen no indication that state water rights authorities are willing or able to replicate this standard in their decision-making. Rather state water rights authorities seize upon one issue or another with respect to a particular proposed project and press that issue without regard for its overall consequences for project economics and other competing public interest factors.

Some have suggested that in light of the *Rock Creek* decision, the authority that S. 106 would grant state water rights authorities to condition water rights granted to hydroelectric project licensees is necessary to protect state fish and wildlife concerns. We disagree. State and federal fish and wildlife agencies enjoy a special advisory status under Section 10(j) of the Federal Power Act. Their recommendations with respect to measures necessary for the protection and enhancement of fish and wildlife resources must be included in licenses issued by FERC unless FERC determines that such recommendations are inconsistent with existing law. This enhanced status for state fish and wildlife recommendations was mandated by Congress in the Electric Consumers Protection Act of 1986 amendments to the Federal Power Act. As implemented by FERC, the vast majority of such recommendations are included without change in FERC licenses. In a limited number of cases, these recommendations have been modified or rejected by FERC to accommodate competing public interests that must be considered in rendering a balanced licensing decision on a multi-purpose water project.

S. 106's reversal of regulatory prerogatives can be viewed as salutary and necessary to protect State fish and wildlife concerns only if one accepts that such state concerns are always valid regardless of whether their merits have been tested and balanced against all other competing beneficial uses. This is a proposition that ACWA, in its commitment to multi-purpose water project development, is not prepared to accept. Further, I would expect that the electric energy and water consumers in our state would also reject such a one-sided proposition.

S. 106, of course, need not be viewed as an environmental protection mandate. It could, just as easily, be used by states to impose conditions on a water rights permit that would nullify or restrict requirements imposed by FERC to benefit fisheries, recreation or any other non-developmental interest. I am aware of no ground swell of support for S. 106 from national environmental groups. State authority, unconstrained by any statutory mandate comparable to the balancing required under Section 10(a) of the Federal Power Act, cannot predictably be expected to serve any one particular interest over the long term. The only thing that is predictable is that the array of public interest factors considered will vary from state to state and be far more limited than that currently mandated by Congress under the Federal Power Act.

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From the standpoint of ACWA members who wish to develop hydropower projects, the certainty that the merits of their hydropower project proposals will be judged and balanced by FERC in competition with all other public interest factors under Section 10(a) of the Federal Power Act is far preferable to the mercurial decisions that could result from the *carte blanche* conditioning authority that would be sanctified by S. 106.

I would like to turn now to the issue of certainty and security with respect to water rights that are so critical to our members in the development and operation of their hydroelectric projects. I am concerned that the conditioning authority that would be granted to states under S. 106 could undermine this security in a manner that could preclude hydropower project development altogether and also could jeopardize the continued operation of existing projects.

With respect to the development of new hydroelectric projects, the conditioning authority provided under S. 106 would permit state water right authorities to impose conditions subordinating any water right granted a licensee to future rights that may be granted for upstream diversions. The benefit conferred to the state by such a subordination condition is that it may grant future upstream diversion rights unconstrained by any water right held by a licensee. The detriment to the project developer is simple and direct. No project can be financed and developed with a water right that is so conditioned. Although here today, subsequent action by state water rights authorities may mean that water necessary for project operation is simply gone tomorrow. On this basis, multipurpose projects, which have historically depended on power generation for a portion of their cost offset would be difficult or impossible to justify. Such subordination is a good example of how the power to condition water use sought under S. 106 is equivalent to the power to veto a project.

The continued viability of the 3300 MW provided by ACWA members' existing hydroelectric projects may also be jeopardized under S. 106, which, in turn, could undermine the ability of these ACWA members to meet increasing water supply demands. Currently these existing licensees are assured by Section 6 of the Federal Power Act that the conditions of their licenses will not be changed without their consent during the term of their licenses. These licensees have invested in and built their projects in reliance on their ability to operate their project as licensed. Their plans to meet customers' power and water needs, as well as crucial revenue projections, are all based on this premise. Under S. 106, the protection afforded project owners by Section 6 during the license term would retain no preemptive effect in relation to "any procedural or substantive requirements of State law with respect to . . . administration of the use of water." If this is interpreted to authorize the imposition of water use restrictions even with respect to previously granted water rights, flow requirements could be imposed that would jeopardize the economic viability and continued multi-purpose operation of these important existing projects. Existing projects currently face a complete reassessment of their license conditions and project benefits in relicensing proceedings at the conclusion of their respective license terms. To introduce the possibility of revised operating requirements also during their license terms would deprive licensees of the very security and certainty that the acquisition of water rights and a federal license are intended to confer.

We in California can speak from experience that the uncertainty provided by Mother Nature with respect to the availability of water to operate our water projects is about all we can handle. As detailed above, the additional uncertainties that could be interjected by the reallocation of state and federal regulatory authority contemplated under S. 106 would have serious consequences for both existing and planned project development.

The administration of state water law in conjunction with legitimate federal interests has long been and will continue to be a complex and controversy ridden matter. ACWA's experience in California, however, reveals that the current allocation of state and federal authority with respect to the development and operation of hydroelectric projects under the Federal Power Act provides the certainty and stability our members require to meet their customers needs for water and power. Under this system, ACWA members, conscious of their duties as public agencies of the state, can fulfill their commitment to meet existing and future water needs in California through multi-purpose water resource development balanced with consideration for protection of existing water rights and all beneficial water uses for fish and wildlife, power supply and other public needs.

On behalf of ACWA, I appreciate this opportunity to share these views with the Subcommittee on Water and Power and urge your careful consideration of the concerns of the California water community regarding the revisions to the Federal Power Act proposed under S. 106.

Senator BRADLEY. Thank you very much.

Let me thank the entire panel for the testimony.

Senator Craig.

Senator CRAIG. Mr. Chairman, thank you very much.

First of all, let me welcome Larry EchoHawk, our State Attorney General, to the committee. I appreciate your testimony, Larry, on the role that Idaho has played in this issue, which I think most western States and, by your testimony, clearly States attorney generals and governors, with Governor Coleman here, reflect the importance of this court ruling and the importance of S. 106 to them.

Let me ask this question. In eastern States which follow the riparian water rights doctrine, licensed hydropower projects share the use of water resources with other reasonable uses even when it results in reduction of water available for hydropower. In the western States, with their prior appropriation doctrine water rights system, this is accomplished by what we call subordination.

Why has FERC refused to accept subordination as requested by Western States, while recognizing the subordination principle in water rights doctrine in eastern States? That seems to be that they find themselves in a direct conflict with what they accept on one side of the Mississippi versus what they accept on the other side of the Mississippi.

Either you or Clive might wish to respond to that. Fine, Clive Strong.

Mr. STRONG. Senator, it is difficult to respond to that question because I think basically FERC has not addressed the issue of the difference between western and eastern water law. I think there is a fundamental misunderstanding from the aspect of the Federal agency as to the nature of the water law doctrines that exist in the State and how those interrelate with one another.

To my knowledge, FERC has at no time considered those differences and attempted to reconcile the position with respect to those two differing doctrines.

Senator CRAIG. Thank you very much.

For sake of time, Mr. Chairman, I will ask one other question of Mr. Fraser. There are a good many I would like to ask of all the witnesses, but I respect your time constraints.

Let me also say, Mr. McSparran, I appreciated your comments and I find them interesting. I had found earlier that in the case of a license in your State of Pennsylvania—and you made reference to that—that the license, in this instance of course a FERC license, actually condemned State property.

I think it shows the power that FERC has, oftentimes when we assume they are a kind and reasonable adjudicating agency, that they can in fact assume powers that they would by their own admission probably never use, although it is clearly reflective in that license that they have the powers and they on occasion have used them.

Mr. Fraser, I appreciate your position, but I find it curious in the sense that I think we all like one-stop shopping. It just cleans the whole process up a bit and clarifies it, and yet at the same time States like yours and mine have found it very important to exercise their rights and feel that oftentimes they can be a better determiner of use.

In your position and the position you have held, that water rights used by FERC-licensed projects, I guess how I want to put this is: Is it your position that the water rights used by FERC-licensed projects should be exempt from I believe in your State what is called the public trust review under California law?

Mr. FRASER. Senator, the public trust doctrine in California—and I am not sure how many other States are struggling with this doctrine—we are not really sure what that doctrine means. It is another element of uncertainty that our members face in connection with any project that they build.

It has yet to be litigated as to what effect this would have on a Federally licensed or a Federally authorized project. We attempted to litigate it, litigate that issue, in connection with the *Audubon* case, but the Federal Government was not interested in taking that issue to the United States Supreme Court.

But that is an issue and it does create uncertainty for us. I think my comments with respect to the importance of certainty is what underlies the fear that many of our members would have with respect to a bill that would in effect cut across all of the licenses and permits that have been issued and are to be issued on hydro.

Maybe we have greater fears in that respect than the water users in Idaho, and that probably would be true.

Senator CRAIG. Well, that may be true in California. But you also made reference to the fact that no project can be financed and developed with a water right that is conditioned on future rights which may be granted for upstream diversion. I believe that is a quote.

I guess what I have to suggest to you is that—are you aware that in the State of Idaho all of our hydros base their financing on subordinated rights?

Mr. FRASER. No, sir, I am not. I am not that familiar with your State.

Senator CRAIG. That is, from the standpoint that they have the water right, but that there is the appropriate adjudication.

Mr. FRASER. Yes. We do not have a situation in California that is similar to that one.

Senator CRAIG. Thank you.

Senator BRADLEY. Thank you very much.

Senator Hatfield.

Senator HATFIELD. Thank you, Mr. Chairman.

Governor Coleman, gentlemen. Mr. Bell, what is the birthday now—how many years has Western States Water Council been in existence?

Mr. BELL. Since 1965, 25 years plus here.

Senator HATFIELD. As a founding member of this Western Water Council, I want to say that it arose primarily out of Governor Pat Brown of California threatening to steal the Columbia River water from the Northwest.

[Laughter.]

Senator HATFIELD. This is not the time to reminisce on the history of the Western Water Council. I am proud to have been a part of that founding, and I welcome you here today, sir.

Mr. BELL. Thank you.

Senator HATFIELD. Mr. Fraser, what would you estimate to be the best or most likely right to protect or responsibility of protecting fish as between California's public trust doctrine or FERC's 10(j) process?

Mr. FRASER. I think with the ECPA amendments in 1986, I believe they were, I think we have a situation where we can go into the licensing process with the certainty that we find to be necessary. The State has every opportunity to provide input on the needs for fish and wildlife and I do not believe we have found FERC to be unwilling to take note of fish and wildlife needs.

Senator HATFIELD. Take note at the time of licensing?

Mr. FRASER. Yes.

Senator HATFIELD. But your court has upheld the right of your agencies represented here today to have that continued responsibility. FERC does this ad hoc.

Mr. FRASER. Yes.

Senator HATFIELD. At the initial time of granting licensing. But you, under your court ruling, if I am not incorrect, have been given the authority to continue that monitoring, that responsibility, where FERC does not evidently have or has exercised a continuing oversight or responsibility.

Mr. FRASER. You cannot blame us for wanting to go to an agency that would give us a greater degree of certainty, I do not believe.

Senator HATFIELD. Thank you, Mr. Chairman.

Senator BRADLEY. Thank you very much, Senator Hatfield.

Let me ask Mr. Bell and General EchoHawk, if you could, in section 2 of the bill, the one that I referred to earlier, it says: "Nothing in this act or any other act shall constitute a Federal preemption of State water law."

In your view, would this language affect Federal reserved water rights or Indian reserved water rights?

Mr. BELL. No, sir.

Senator BRADLEY. Mr. EchoHawk?

Mr. ECHOHAWK. Mr. Chairman, in order to abrogate an independent reserved water right, there has to be express congressional intent, and I think that that is clearly absent from the amendment that is being proposed to the Federal Power Act. There would be no jeopardy by passing this bill to take away the Indian water rights.

Senator BRADLEY. And that intent is expressed by the words of the author of the bill; is that what you mean?

Mr. ECHOHAWK. I think that if there was any design to strip away Indian water rights that would have to be very express, and that is not in this bill.

Senator BRADLEY. How about congressionally affirmed interstate compacts? Mr. Bell? Keep in mind nothing in the act or any other act constitutes a Federal preemption.

Mr. BELL. In my view, it is neither the intent nor justified in the text to interpret that that way.

Senator BRADLEY. Mr. EchoHawk?

Mr. ECHOHAWK. I agree with that.

Senator BRADLEY. And international treaties?

Mr. BELL. No, no effect.

Senator BRADLEY. Mr. EchoHawk?

Mr. ECHOHAWK. No.

Senator BRADLEY. Let me, if I could, ask Governor COLEMAN. What happens if you have, if S. 106 were passed, you would have two or more States and they are bordering and they have imposed inconsistent conditions? Which condition prevails and who decides?

That is a tough question. If you want to defer that to lawyers, feel free to do that.

Governor COLEMAN. I would like to refer it to one of the experts.

Senator BRADLEY. Mr. Bell?

Mr. BELL. My answer would be that there are well-established vehicles for States to resolve their differences. They are fairly rare. They are resolved amicably in most cases. There are two vehicles available, both in terms of a court case for an equitable apportionment to resolve conflicts and an interstate compact.

So there are vehicles to resolve those conflicts. I do not think we need the Federal Energy Regulatory Commission to do so.

Senator BRADLEY. Okay. Let me, if I could, ask Mr. EchoHawk about Idaho water law. Does Idaho water law require a State engineer to take into account impacts on interstate or international migratory resources like salmon when issuing a water right?

Mr. STRONG. Mr. Chairman.

Senator BRADLEY. Mr. Strong.

Mr. STRONG. Mr. Chairman, Idaho water law requires the State Director of Water Resources to take into account all applicable laws in consideration of the issuance of a water right, and in particular the issues under the public trust or public interest values under Idaho law require consideration of fishery and wildlife interests.

Senator BRADLEY. So the answer is yes?

Mr. STRONG. Yes.

Senator BRADLEY. Mr. Fraser, you are the odd man out here.

Mr. FRASER. Yes, it looks like it, a sheep in wolf's clothing.

Senator BRADLEY. Do you have any explanation for that? Why is that? Every other Western State is for this, but you are not. Why is that, I wonder?

Mr. FRASER. I am sorry, Mr. Chairman. Would you repeat your question?

Senator BRADLEY. Why is it that California is not supportive of this, but every other State appears to be in the West?

Mr. FRASER. Keep in mind, our water rights administrators in California certainly would be in support of this legislation. We are the water users in California and hold a little bit different position than they would.

Senator BRADLEY. So it is just your association that is not in support of it?

Mr. FRASER. Yes, sir.

Senator BRADLEY. But the State is in favor of it?

Mr. FRASER. I would not want to represent what their position is, but I am sure Mr. Bell would know.

Senator BRADLEY. Mr. Bell?

Mr. BELL. Both the Governor and the State water administrator support this bill.

Senator BRADLEY. Let me ask you, Mr. Fraser, is your association, do you think, seeking to avoid State and Federal water quality standards for the delta?

Mr. FRASER. Through this legislation? Certainly not. We certainly would see no implication here at all to override provisions in the Clean Water Act, Endangered Species Act, the Fish and Wildlife Coordination Act. Whatever act you might imagine that is applicable here would certainly not be eliminated or overridden, as I understand it.

Senator BRADLEY. Well, let me thank you all very much for your testimony, and I appreciate your taking the time. It has been very helpful.

Our next panel consists of: Ted Strong, Executive Director, Columbia River Inter-Tribal Fish Commission; Sam Penney, Tribal Executive, Nez Perce Tribe; Zane Jackson, Chairman, Confederated Tribes of Warm Springs Reservation of Oregon.

Senator CRAIG. Mr. Chairman.

Senator BRADLEY. Senator Craig.

Senator CRAIG. As this panel comes to the table, Sam Penney, who is Vice Chairman of the Tribal Executive Committee for the Nez Perce Tribe in Idaho, was here, but had to return home because of a death, I believe, on the Tribal Council. So I wanted that stated for the record. He came, was here for the purpose of testifying, but had to return.

So I would ask unanimous consent, unless his testimony is going to be given by someone else here—Doug, you are going to do it?

Mr. NASH. That is correct.

Senator CRAIG. Okay, fine.

Senator BRADLEY. Mr. Strong, welcome to the subcommittee. I will ask you to abide by a 5-minute rule. I would like to hear everyone for the rest of the afternoon, but I do have to cut you off after 5 minutes.

STATEMENT OF TED STRONG, EXECUTIVE DIRECTOR, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, PORTLAND, OR

Mr. STRONG. Mr. Chairman, thank you very much.

As a matter of fact, I am going to have to leave within 5 minutes to catch a flight for the very same reason that Mr. Craig was alluding to earlier.

Mr. Chairman, members of the committee: Thank you for this opportunity to testify. For the record, I am Ted Strong, Executive Director of the Columbia River Inter-Tribal Fish Commission. The Commission was created by the Nez Perce, Yakima, Warm Springs, and Umatilla Tribes in 1977. These tribes reserved by treaty with the United States the right to take fish at all usual and accustomed fishing places, including the main stem Columbia River.

Today the tribes have established sophisticated fisheries management programs. The Fish Commission serves these tribes in their gravel-to-gravel management efforts.

During this century the Indian people of the Columbia River have witnessed a decline in the salmon resource that no one foresaw when the treaties were signed. Water resources development, primarily hydropower projects, account for the largest share of salmon loss. Once the Columbia River supported runs of 16 million salmon. Now less than 3 million salmon return.

S. 106 would hamper our efforts to rebuild the Columbia salmon resource. Protection, mitigation, and enhancement measures require coordinated and comprehensive actions. S. 106 will lead to regulatory fragmentation. Rather than the comprehensive approach of the Federal Power Act, S. 106 says in effect in all cases of conflict between State and Federal interests in water, the State will prevail.

The Pacific Northwest region has invested hundreds of millions of dollars in salmon recovery efforts and we are facing new challenges with the potential application of the Endangered Species Act to various salmon stocks. Now is not the time to disrupt the delicate balance of existing State and Federal authorities.

In conclusion, Mr. Chairman, members of the committee, the Columbia River Inter-Tribal Fish Commission cannot and does not support S. 106.

Thank you.

[The prepared statement of Mr. Strong follows:]

PREPARED STATEMENT OF TED STRONG, EXECUTIVE DIRECTOR, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, PORTLAND, OR

Thank you for this opportunity to testify on S. 106. The Commission was created by Nez Perce, Warm Springs, Yakima, and Umatilla Indian tribes in 1977. These tribes reserved, by treaty with the United States, their aboriginal rights to take salmon at usual and accustomed fishing places. Since the United States and the tribes signed the treaties in 1855, the United States Supreme Court has affirmed the tribes' fishing rights no less than seven times.[1] Today, the tribes have established their own sophisticated fisheries management programs. The Commission serves the tribes in their gravel-to-gravel salmon management efforts.

All life-phases of the salmon are critical to the species. Hence, the term "gravel-to-gravel" takes on special importance in our salmon management. From their spawning grounds, through the rivers and hydroelectric projects, ocean fisheries, and back through the hydro-system, Columbia River salmon are confronted by many impacts and jurisdictions.[2] Each must be addressed to assure proper resource stewardship.

Salmon have existed in the Pacific Northwest for thousands of years. They have survived ice ages and droughts. For the Indian people, the salmon were and are integral to culture and commerce. This century we witnessed a resource decline that no one foresaw when the treaties were negotiated. Sixteen million salmon once returned to the Columbia, now less than three million salmon return.[3]

Over the last ten years the Commission has struggled to assure that the actions of federal government, Canadian government, and various state agencies are coordinated to protect and rebuild the salmon. Too often, we have found that various regulatory agencies are guided by local concerns and fail to account for the sovereign commitments of the United States concerning this resource and the needs of the species throughout its range.

Water resources development, principally hydropower projects, account for the biggest share of salmon lost in the Columbia Basin.[4] Water resources projects have

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[1] See *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn*, 443 U.S. 658, 679 (1978) (recounting previous reviews by the Court of treaty fishing rights).

[2] Columbia and Snake River salmon resources (the fish and their habitat) are already subject to the jurisdiction to more than twenty state, federal, and tribal entities from the Alaska Department of Fish and Game to the Federal Energy Regulatory Commission. *See generally* Wilkinson & Connor, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of A Transboundary Common Property Resource*, 32 U.Kan.L.Rev. 17 (1983).

[3] The Northwest Power Planning Council reached these conclusions after extensive review of the best available scientific information. NPPC, Columbia River Basin Fish and Wildlife Program, section 203(b) (1987).

[4] Hydropower projects on the mainstem Snake and Columbia rivers cause up to 15 to 30 percent mortality per project on downstream migrating salmon. Cumulatively, the impacts of eight or more projects can exceed 90 percent mortality on salmon stocks that must migrate past these dams to reach the ocean. Additional impacts are caused on the upstream migration. Of the total loss of salmon in the Columbia Basin, five to eleven million salmon were lost due to hydropower development. NPPC, Columbia River Basin Fish and Wildlife Program, section 203(b) (1987).

blocked access to spawning grounds, impeded upstream and downstream migrations, and de-watered salmon habitat. Less obvious, but equally damaging biological impacts include changes in water temperature, predator abundance, food supplies, and spawning gravel recruitment.

Any of these impacts reduce the productivity of a salmon population. Each impact imposes a burden of conservation that must be borne by the project developer, another group such as fishermen, or the salmon resource itself. Unfortunately, the burden of conservation has often been shifted from water resources development to fishermen and to the resource. The conservation burden now weighs so heavily upon the salmon resource that various stocks of salmon are being considered for listing under the Endangered Species Act.[5]

S. 106 would subordinate the licensing processes of the Federal Energy Regulatory Commission to the jurisdiction of state water resources departments. While, the Commission's member tribes have had to resort to litigation to ensure FERC decisions provide adequate conservation measures for the salmon resource,[6] S. 106 only heightens our concerns. Adding another layer of potential conflicting jurisdiction to the licensing process will not protect the salmon resource.

Protection of the salmon resource requires coordinated and comprehensive actions. In the Columbia Basin, such coordinated action requires the cooperation of federal, state, tribal, and Canadian governments. Congress has previously expressed a commitment to coordinated study and comprehensive planning along an entire river system." [7] Thus, FERC has a mandate to assure that projects are best adapted to a comprehensive plan for the waterway.[8] Regulatory fragmentation is inconsistent with this comprehensive approach to river system planning and could defeat efforts to address international and interstate concerns for salmon rebuilding.

FERC can and does require conditions on water storage and flow in the licenses for operation of hydropower projects. Technically advanced methods are routinely applied in licensing processes to determine water requirements for salmon. Studies using the Instream Flow Incremental Methodology (IFIM) are now commonly completed in the licensing process. On the basis of sound technical information, fisheries experts from the tribes, states, and federal agencies recommend license conditions based on the needs of the salmon resource. FERC can then weigh the technical merits in accordance with various federal laws, including Indian treaty rights, and mandate license conditions.

In contrast, state law, both in procedure and substance, in the Pacific Northwest varies greatly from state to state. For instance, Washington recognizes instream flow rights, yet may not have effective enforcement mechanisms.[9] Moreover, Washington has been reluctant to recognize Indian and federal water rights,[10] even though such reserved water rights "are not dependent upon state law or processes." [11] S. 106 should not be allowed to undermine well-established Indian and federal water law.

In Idaho, instream flow rights are also recognized under state law, but may be subject to review by the Idaho legislature.[12] Will conservation measures imposing instream flow requirements for a hydropower project license await legislative action in Idaho? Is the Idaho legislature a suitable forum for technical review of scientific recommendations from fishery biologists from federal and tribal agencies?

Licensing decisions even on small projects in different parts of an interstate river system can have important cumulative effects, which may not be apparent or conse-

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[5] 56 Fed. Reg. 14055 (April 5, 1991) (NMFS proposed rule to list Snake River Sockeye Salmon as "endangered" under the Endangered Species Act).

[6] *Confederated Tribes and Bands of the Yakima Indian Nation* v. *FERC*, 746 F.2d 466 (9th cir. 1984).

[7] *National Wildlife Federation* v. *FERC*, 801 F.2d 1505, 1507 (9th Cir. 1986) (Nez Perce Tribe was a party to this case); *LaFlamme* v. *FERC*, 842 F.2d 1063, 1073 (9th Cir 1988).

[8] 16 U.S.C. 803(a).

[9] Even where state-established minimum stream flows exist, civil enforcement procedures are problematic in Washington. As of 1988, Washington could impose a maximum penalty of $100 per day for violations, which were willingly paid and ineffective deterrents. See Barwin, Slattery, and Shupe, "Protecting Instream Uses In Washington State," (March 9, 1988) published in "Instream Flow Protection in the Western United States: A Practical Symposium," March 31-April 1, 1988, University of Colorado School of Law.

[10] See *Colville Confederated Tribes* v. *Walton*, 647 F2d 42 (9th Cir. 1981) *cert. denied* 454 U.S. 1092 (1981).

[11] *Colville Confederated Tribes* v. *Walton*, *752 F.2d 397, 400 (9th Cir. 1985) quoting Cappaert* v. *United States*, 426 U.S. 128, 145 (1976); see also *United States* v. *Adair*, 723 F.2d 1394, 1411, n. 19 (9th Cir. 1983) *cert. denied* 104 S.Ct. 3536 (1984).

[12] See *Idaho Power Company* v. *State*, 104 Idaho 570; 661 P.2d 741 (1983) (relative powers of the Idaho Water Resources Board and the legislature regarding the State Water Plan).

quential to a single state regulator. In settings such as the Columbia Basin, decisions on whether and how to license a hydropower project in one state have had adverse effects on salmon recovery efforts in other states.[13]

The Pacific Northwest has invested hundreds of millions of dollars in salmon recovery efforts that could be disadvantaged by locally focused decision making. At worst, such decision making would overtly seek to shift the conservation burden from the state licensing the project to other states, tribes, or federal agencies for them to offset the impacts by reducing fisheries,[14] funding mitigation, or revamping the operation of other water resources projects.

In conclusion, the Commission has supported measures that will assure coordinated action to protect and rebuild salmon resources consistent with the United States' treaty obligations. Shifting those obligations to state governments, however, is inconsistent with the government-to-government relationship between the tribes and the United States. Equally important, salmon recovery depends on coordinated, not fragmentary, actions. The implications of S. 106 are antithetical in both respects.

Senator BRADLEY. Thank you very much, Mr. Strong.

Mr. Jackson.

STATEMENT OF ZANE JACKSON, CHAIRMAN, TRIBAL COUNCIL, CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, WARM SPRINGS, OR, ACCOMPANIED BY JAMES D. NOTEBOOM, ATTORNEY

Mr. JACKSON. Thank you, Mr. Chairman. My name is Zane Jackson, Chairman of the Tribal Council of Warm Springs, Oregon. I appreciate this opportunity to be here today to testify on S. 106. I would like to summarize my statement and submit to the record a written statement.

Senator BRADLEY. Your full statement will be printed in the record.

Mr. JACKSON. Mr. Chairman, the Warm Springs Tribes oppose S. 106. Our reservation in north central Oregon runs from the crest of the Cascade Mountains in the West to the deep canyon Deschutes River in the East. Our southern border is the Metolius River.

Because of this geography, one of our reservation's greatest natural resources is its capacity to produce hydroelectric power. Presently there are three FERC-licensed dams adjoining our reservation on the Deschutes River. They form the 440 megawatt Pelton project, the land rental from which provides about half our tribal operating expenses.

Portland General Electric Company operates the two large dams and our tribe owns and operates the 15 megawatt generator on the smaller dam. The tribe is the first to receive a FERC license and we are a co-licensee with Portland General Electric.

As an existing licensee, S. 106 could diminish our sovereign powers as a tribal government. According to the terms of S. 106, it could be interpreted to extend State water law onto our reserva-

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[13] Development of the Hells Canyon project of three dams on the mainstem Snake River, not only blocked salmon migrations into southern Idaho, but resulted in various difficulties for the Columbia River treaty tribes' management of their fair share of salmon harvests, the State of Washington's management of Lyons Ferry Hatchery intended to mitigate the impacts to chinook salmon blocked by Hells Canyon Dam, and the Corps of Engineers' management of its hydroelectric projects that impact the remnant chinook population.

[14] Since the treaties were signed, the tribes have resisted attempts by Pacific Northwest states to assert jurisdiction over tribal fishing activities. Thus, the states are not free to impose their own "wise-use" management restrictions on tribal fisheries. The states are free to regulate their own citizenry for any rationally related purpose with respect to the states' 50 percent share of the harvestable resource, but they are not free to so regulate the tribes. *Sohappy* v. *Smith*, 302 F.Supp. 899, 910-12 (D.Or. 1969).

tion, where it does not now exist. Mr. Chairman, this could constitute a fundamental attack on tribal sovereignty and self-determination.

We at Warm Springs have always protected our sovereign authority over our land, our people, and our water. Years ago we sought and obtained a specific exemption from Public Law 280, which otherwise extended State jurisdiction onto a number of Indian reservations. We resisted that law and today we resist S. 106.

S. 106 could violate our treaty with the Federal Government which secures water rights for our tribe. In fact, our tribes are now in the process of negotiating our water rights with the State and the Federal Governments. S. 106 would seriously undercut several specific proposals made by the tribes.

Similarly, the extension of State water law onto Indian lands would interfere with the Federal Government's trust responsibilities to manage and protect our lands and resources for our exclusive benefit.

Finally, the Warm Springs reservation has considerable undeveloped hydroelectric potential that the tribes may develop in the future. The State of Oregon should not have the decisionmaking over these projects. That should clearly rest with the tribes and our trustee, the Federal Government.

Mr. Chairman, in closing I would like to ask that Portland General Electric, who also oppose Senate bill, that their statement be included with ours for the record.

Senator BRADLEY. Their statement will be included in the record. Thank you very much, Mr. Jackson.

[The prepared statements of Mr. Jackson and Ms. Fowler follow:]

PREPARED STATEMENT OF ZANE JACKSON, CHAIRMAN, TRIBAL COUNCIL, CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, WARM SPRINGS, OR

Mr. Chairman, Members of the Committee, my name is Zane Jackson and I am the Chairman of the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon. I am here today to express the Tribes' opposition to S. 106.

The Warm Springs Reservation is located in North Central Oregon. The Reservation consists of approximately 640,000 acres, and over 99% of the Reservation is owned by the Tribes or Indian allottees. The Reservation is bounded on the west by the summit of the Cascade Mountains, on the south by the Metolius River, and on the east by the Deschutes River. Several rivers originate on the Reservation in the high Cascades and run in an easterly direction through the Reservation flowing into either the Metolius River or the Deschutes River. One of the greatest natural resources of the Reservation is its capacity to produce hydroelectric energy.

There are three dams on the Deschutes River adjoining the Reservation that form the Pelton Hydroelectric Project. The portion of the project located off the Reservation uses a federal powersite reserve. The portion of the project located on the Reservation utilizes lands encompassed within an Indian powersite reserve. Indian powersite reserves were established not for the benefit of the general public, but for the benefit of the Indian Tribe whose lands were being used for hydroelectric development. Other such Indian powersite reserves within the Reservation were established shortly after the turn of the century by the federal government and still exist.

The Pelton Project has an installed capacity of approximately 440 MW. Portland General Electric Company operates the two largest dams and pays land rentals of approximately 7 million dollars per year to the Tribes as compensation pursuant to Section 10(e) of the Federal Power Act. The Tribes, as co-licensee, built and operate a 15 MW facility in the smallest of the dams. That facility was completed by the Tribes in 1980 at a cost of 30 million dollars. The Tribes sell the output from that project to Pacific Power & Light Company and realize approximately 3 million dol-

lars per year in profit. The revenues derived from the Pelton Project provide approximately one-half of the annual Tribal governmental budget used to fund such things as law enforcement, emergency services, resource management, and educational programs.

In addition, the Reservation has substantial undeveloped hydroelectric potential. The Tribes have already completed a feasibility study for a project to be located on the Whitewater River. This project would have an installed capacity of 3½ MW. Accordingly, the Tribes have a great interest in any legislation that may affect its ability to develop and operate hydroelectric projects on the Reservation. If S. 106 had been law in 1950, in all likelihood there would not have been a Pelton Project. In fact, it was the project to be located on the Warm Springs Reservation that gave rise to the "Pelton Decision" issued by the Supreme Court in 1955. *Federal Power Commission* v. *State of Oregon*, 349 USC 435, 99 L.Ed. 1215, 75 S. Ct. 832. The project has been a vital key to the economic success of the Warm Springs Tribes.

The Tribes recognize that Tribes and States often have important non-energy concerns about hydroelectric development that may not have been adequately considered 40 years ago. However, from a legal and practical viewpoint the situation is very different now than it was in 1950 and FERC now must consider a wide variety of non-power issues when making licensing decisions. For example, the Electric Consumer Protection Act of 1986 aided in the protection of a wide variety of non-energy interests. In addition, a whole host of environmental protection laws have placed further constraints on the development of hydroelectric facilities. Finally, Indian Tribes are now much more able to protect their non-energy interests, including fishing and cultural rights than they were half a century ago.

The Tribes are also very concerned about any extension of State jurisdiction onto the Reservation. These concerns go back along way. For example, the Warn Springs Tribes were the only Tribes in Oregon exempted from the provisions of Public Law 280 enacted in 1953 generally providing for the extension of state civil and criminal jurisdiction onto Indian Reservations in several states, including Oregon. This was done after careful deliberation by the Congress. On the Warm Springs Reservation we exercise our sovereign authority for our people, our land, and our waters. We have primary responsibility for the protection and development of Reservation resources. S. 106 could be construed to extend State water law and authority onto the Reservation when it does not now exist. This would constitute a fundamental attack on Indian sovereignty and self determination. The responsibility also lays with the federal government in carrying out its trust responsibility. Pursuant to the Federal Power Act the Secretary of the Interior has the power to impose mandatory conditions in the license pursuant to Section 4(e) of the Act. We are confident that the Secretary of the Interior will provide the necessary protection for Tribal resources and interests as a whole. For these reasons the Tribes believe that it is inappropriate and unnecessary to place additional conditioning authority in the hands of the State.

The importance of this issue to the Tribes is underscored by provisions of the proposed water settlement agreement by which the Tribes, the federal government, and the State of Oregon would quantify the Tribes' treaty water right. This proposal is even now being considered by the State of Oregon. The Tribes have proposed that "the Tribes also have the right, under the Winters Doctrine and Treaty, to the entire natural flow of all waters arising wholly within and traversing the Reservation lands to preserve and enhance the Reservation's ecosystems and to develop and operate nonconsumptive hydropower generating projects on the Reservation." The proposed agreement also provides that the Tribes will have the exclusive and final jurisdiction to administer the Tribes' water right and that the administration and enforcement of the Tribes water right shall be pursuant to the Tribal Water Code or other applicable Tribal law. The proposed agreement also provides that "no agency of the State shall administer any part of the Tribal water right." The provisions of S. 106 would seriously undermine each of these proposals.

Thank you for your consideration.

PORTLAND GENERAL ELECTRIC COMPANY,
Portland, OR, May 24, 1991.

Hon. BILL BRADLEY,
The Senate Hart Building, Washington, DC.

RE: S. 106

DEAR SENATOR BRADLEY: Portland General Electric Company (PGE) is the licensee for five federally licensed hydroelectric projects, the output of which equals approxi-

mately 13 percent of PGE's system requirements. Continued operation of these facilities could be curtailed or prevented by the terms of S. 106. In addition, PGE's 584,000 customers benefit significantly from the coordinated operation of the Pacific Northwest hydroelectric system. Such coordination would become virtually impossible if S. 106 is enacted.

Federal authority over the fundamental operating conditions that are applied to hydroelectric plants is longstanding and was just recently reaffirmed when Congress passed the Energy Consumer Protection Act in 1986. In that Act, Congress charged the Federal Energy Regulatory Commission (FERC) with achieving the appropriate balance among the many interests. The consultation process provided for in that Act remains largely untried; moreover, unless there is one arbiter of these disputes, it will be nearly impossible to secure the balance Congress was seeking. S. 106 would disrupt an important new initiative without giving it an opportunity to work.

The proponents of S. 106, in seeking to overturn the Supreme Court's decision in *California* v. *FERC*, assert that the court somehow diminished the authority of the states. Nothing could be further from the truth. The Supreme Court's decision merely reaffirmed a 45 year-old practice granting ultimate authority to FERC for the establishment of license conditions at hydro plants.

S. 106, whether it applies to existing or new projects, is a dangerous bill which could severely impact hydro operations in the Northwest without any appreciable offsetting benefits. PGE urges you to oppose S. 106.

Sincerely,

PEGGY Y. FOWLER,
Vice President, Power Production.

Senator BRADLEY. Mr. Nash.

STATEMENT OF DOUGLAS NASH, CHIEF COUNSEL, TRIBAL EXECUTIVE COMMITTEE, NEZ PERCE TRIBE

Mr. NASH. Mr. Chairman, members of the subcommittee, my name is Douglas Nash. I am Chief Counsel to Nez Perce Tribal Executive Committee.

I thank you for your understanding of Mr. Penney's situation, Senator Craig, and his inability to be here.

Rather than recover the testimony that we have already submitted in writing on behalf of the Nez Perce Tribe, I would just initially point out that we concur with the testimony given earlier in this panel and state that to the Nez Perce Tribe S. 106 seems to cause us to raise more questions than bring answers to this subcommittee.

It appears that one of the serious effects in our view that this bill would have would be to convey jurisdiction to States where their jurisdiction does not now exist. It raises the possibility of States having veto authority over hydropower projects.

To us, that is a serious possibility when, like the Nez Perce Tribe, we find ourselves in competition with the State for hydropower development. The Nez Perce Tribe has been consistent in pursuing projects that are consistent with the Federal policies of economic development for Indian tribes and self-determination for tribal governments, and we fear the impacts that S. 106 would have on those efforts of the Nez Perce Tribe.

Thank you.

[The prepared statement of Mr. Penney follows:]

PREPARED STATEMENT OF SAM PENNEY, VICE CHAIRMAN, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE

Chairman Bradley, members of the subcommittee, my name is Sam Penney. I am the Vice Chairman of the Nez Perce Tribal Executive Committee, the governing body of the Nez Perce Tribe. On behalf of the Nez Perce Tribe, I extend our appre-

ciation to this body for the opportunity to appear before you today to express our opposition to this bill.

By way of background, the Nez Perce Reservation is located in what is now north-central Idaho and occupies approximately 750,000 acres. The reservation encompasses about sixty miles of the Clearwater River which is a major tributary to the Snake River at their confluence at Lewiston, Idaho, and Clarkston, Washington. There are numerous tributaries that join the mainstem Clearwater on the reservation, including about ten miles of the South Fork of the Clearwater and six miles of the North Fork. In addition, there are many tributaries that arise within the reservation boundaries.

The Nez Perce Tribe is party to three treaties and one agreement with the United States. The primary purpose of the United States in securing these treaties and the agreement was to secure land from us. The consideration we gave in this process was in excess of 12,000,000 acres of land. The Nez Perce Reservation was established where it was not only to provide a homeland for our people but also to insure that we would have the use of the Clearwater River which has been central to our existence since time immemorial. In the treaty of June 11, 1855, 12 Stat. 957, we expressly reserved the exclusive right to fish in all streams on and bordering our reservation. The Clearwater River is an important part of the system that produces salmon and steelhead. Such fish have cultural and religious significance to us and we have long-standing plans to actively participate in the recovery effort for those species of fish that have recently been recognized as being threatened.

The State of Idaho has commenced a legal proceeding in state court encaptioned "In Re the General Adjudication of Water Rights to the Use of Water from the Snake River Basin Water System," Case No. 39576. This general stream adjudication includes the Clearwater River and its tributaries and is likely the single largest stream adjudication in history.

The Nez Perce Tribe has long claimed water rights pursuant to the *Winters* doctrine as described by the United States Supreme Court in the case of *Winters* v. *United States*, 207 U.S. 564 (1908.) The full extent of those rights—to sufficient water to meet the purposes for which our reservation was established and to fulfill the rights reserved in our treaties—will be determined as a result of this adjudication. The Nez Perce Tribe is not yet a party to this litigation. We are working with the United States, who is a party and representing our interests as our trustee, in the preparation of claims to water that will be made in the context of this adjudication. The result of this process will be that the water rights of the Nez Perce Tribe will be quantified and we will be the "owners" of a specific quantity of water.

At the present time, the only hydropower development on our reservation is Dworshak Dam which is located on the North Fork of the Clearwater River approximately one and one-half miles upstream from the confluence of the North Fork and main stem of the Clearwater Rivers. This dam was constructed and is operated by the U.S. Army Corps of Engineers. The Nez Perce Tribe received no compensation for the construction of this dam on the reservation nor for any of the impacts it had upon tribal rights. We have no role in the operation of it and receive no benefits or income from its operation.

We are an applicant for a preliminary permit for a hydropower project that would be located on the reservation at the site of the Clearwater Fish Hatchery that is currently under construction at the mouth of the North Fork of the Clearwater River. This hatchery will receive its water supply from a pipeline that will extend from Dworshak Dam and it is our proposal to install power generation facilities on this pipeline. We are one of three applicants for this preliminary permit. We are in competition with the State of Idaho, Water Resources Department and Bonneville Power Administration acting in a joint effort to secure this permit as well as with a private developer. These applications are still pending before the Federal Energy Regulatory Commission.

In addition, The Nez Perce Tribe is currently considering seeking a preliminary permit for another hydropower site and has plans to explore other potential sites within the reservation.

Mr. Chairman, I offer this background to set the stage for our comments on S. 106. It is our reading of the bill that it would extend state substantive and procedural laws pertaining to acquisition and administration of water rights to the Nez Perce Tribe for any project which we might seek a license under the Federal Power Act.

Congress has long endorsed policies of self-determinaion and economic self-sufficiency for Indian Tribes. That tribes are entitled to a government-to-government relationship with the United States has also received recognition and endorsement. S. 106 would be a drastic encroachment upon those policies.

The Nez Perce Tribe is striving to achieve a greater degree of economic self sufficiency. Our most fundamental economic base, our land, was decimated by treaties and subsequent federal policies that opened our reservation to settlement by non-Indians. There is currently not one program within the Bureau of Indian Affairs or the Department of Interior that is available to assist us, or other tribes, in reacquiring that land base. Consequently, we have negotiated financing with commercial financial institutions to pursue that goal. We operate five separate enterprises to generate income for our tribe. While no state or local governments are obliged to generate revenues in this manner, we are and we seek to expand those efforts. Hydropower generation, when consistent with our reserved fishing rights and corresponding interests, is one of the means by which we can increase our economic self-sufficiency.

It is not uncommon for states and Indian tribes to disagree over legal issues and to be in competition with each other on a wide variety of issues. Certainly, that is the situation we are in with regard to our present effort to secure a hydropower project. If compliance with state law is a prerequisite, it is entirely conceivable that state law may be in direct conflict with tribal water rights as determined by adjudication or by a negotiated agreement. This bill would directly subject federally reserved rights held in trust for tribes to administration under state law, a position many tribes cannot tolerate, given the historic conflicts in the water dependent Western United States. We would hope that the Federal Government, as our trustee, would be equally reluctant to have state jurisdiction imposed over federally reserved water rights. Further, S. 106 would leave the door open to the enactment of state laws that could be expressly aimed at thwarting tribal efforts to secure a hydropower project. Where the state is also an active participant in hydropower development this bill would give them an extremely unfair advantage and place the state in a conflict of interest insofar as Indian tribes are concerned.

It is established that state law cannot apply to Indian Tribes on their reservations unless expressly authorized by Congress. While we recognize this legal principle, we do not agree that state jurisdiction is useful, helpful or even desirable generally or in the context of hydropower licensing and development or water rights.

We also view S. 106 as significant departure from the trust relationship that exists between the United States and the Nez Perce Tribe. The obligations imposed by that relationship call upon the United States, as trustee, to protect the rights and interests of the tribe. That the interests of states are often inimical to those of Indian tribes has frequently been recognized. S. 106 would have potential adverse impacts upon our reserved water and fishing rights—both of which are within the scope of the trust relationship.

Mr. Chairman, the Nez Perce Tribe respectfully submits its opposition to S. 106 for these reasons.

Thank you again for the opportunity to appear here today to express our concerns about this measure.

Senator BRADLEY. Thank you very much, Mr. Nash.

Senator Craig.

Senator CRAIG. Gentlemen, thank you all very much for your testimony. I guess I am very frustrated by what you are telling me or what you are telling me you think the law says.

Doug, in the case of the *State of Idaho*, does not the State of Idaho recognize Federally reserved water rights?

Mr. NASH. I believe that is correct, Senator.

Senator CRAIG. Is not your water right as it relates to treaty and Indian right Federally reserved?

Mr. NASH. It is.

Senator CRAIG. Thank you. That is the text of my frustration with you coming in to oppose this legislation. We are speaking specifically to the Federal Power Act. We are giving no greater authority than has largely been the practice of the past, recognizing, as all States do by court order, Federal reserved water rights. And in all instances Indian water rights are Federally reserved water rights.

Ted, I truly appreciate your involvement over the last good many months in the Salmon Summit and the tremendous contributive

effort that the Indian tribes of the Pacific Northwest have made in that issue in trying to resolve what is a very legitimate problem and concern.

Other witnesses have testified in opposition to S. 106 that the States want an absolute power to protect localized water-related interests, interestingly enough, such as fisheries. You have testified in opposition to S. 106 that it would provide a mechanism for States to provide hydropower at the expense of fish resources.

I guess the question is: Which position is correct? I do not think it can be both ways.

Most States are arguing today for a right to protect a multiplicity of purposes. FERC is by its very nature hydro-driven.

Mr. STRONG. Senator Craig, it took the impact and it took the full conscience and the weight of a Nation to bring many States, including the State of Idaho, to the table to begin rebuilding the salmon runs, which have declined so drastically in this past 50 years as a matter of fact. If it were not for the Endangered Species Act, I would have to in all conscience say that I am not so certain that the States would be so participative in a rebuilding effort, because locally there are economics and laws of economics that supersede the cultural laws that tribes are trying to develop and implement, that were preserved by the treaty, and sometimes the two, as you suggest, are not able to be reconciled.

The resident fish program within a State oftentimes, while it is a fishery program and indeed a wildlife program and it may in fact account for the wise use of a natural resource, will conflict seriously with anadromous fish programs.

Senator CRAIG. So maybe I am then beginning to better understand the opposition I am hearing from this particular panel. It is that you believe that a Federal agency is going to be more responsive to performing to or complying with Federal law, in this instance the Endangered Species Act, than a State agency or a State authority would be?

Mr. STRONG. If one, Senator Craig, would look historically, the relationship between——

Senator CRAIG. You cannot look historically, though.

Mr. STRONG. Well, even if we look contemporarily at the way things are today, the way that things are today between tribes and States, many times the relationship is very strained, because we cannot—we are not allowed to look historically.

If we look forward, what we have to look forward to is a relationship that we have not clearly defined yet as one of trust, as one of negotiated agreement.

Senator CRAIG. When we are talking contemporary versus historic, I think you and I could both agree that the problems we have in the Snake-Columbia River system today as it relates to anadromous fish is a historic problem. The law that is addressing it is a contemporary law, relatively new to the problem that was created substantially a long time ago by the construction of hydro projects and other things on the river.

I guess that is the point I am attempting to make. I do not blame you for your historic perspective. You have a legitimate basis to argue that point.

I guess my concern as it relates to the law today and as it relates to S. 106 is that I think your interests specific to your testimony and to the testimony collectively must be addressed now by both interests, whether it be State or Federal.

Mr. STRONG. Senator Craig, if I may, both interests, State and tribal, I believe have an appropriate objective forum, and that is the Federal Government. We have worked long and hard to effect the structure and the process that is implemented by the Federal Power Act.

To have any kind of disruption of that at this present time would require an extensive amount of investment of time, money, and so forth in educating and orienting each other as to how it is going to work best in the future.

Senator CRAIG. Okay. Thank you all.

Senator BRADLEY. Senator Hatfield.

Senator HATFIELD. Mr. Chairman, I have no questions. I am just very glad to have Mr. Strong, Mr. Nash, and Mr. Jackson here. They have been very strong participants in our salmon summit that has been underway for quite some time addressing this as a region with the Federal and the State agencies involved, and it has proved, I think, to be a forum that has launched a new approach that hopefully will lead to a regional mitigating action and solution, not in any way to displace the endangered species or to sidetrack that process, which is on track, but rather to indicate that under the Northwest Power Act we take that responsibility seriously within the region and that we are served better by working out these problems together than in adversarial roles that have so often been played out as between Federal and State agencies.

No one claims that we have reached a solution or that we have reached the ultimate response to this question of endangered species.

Mr. Chairman, when you are looking at the generation of power and the relationship of energy, 62 percent of our dependency in hydro systems, when you look at the fact that we are a river of commerce, we are a river of irrigation and agricultural production, all these multiple uses, it behooves us to look at this on a very broad base and not just on a narrow perspective of user groups or commercial groups or, even as the Indian nations have indicated, they are guaranteed 50 percent.

That is by treaty. But their future is also at stake as to 50 percent of what, and that is why we are bound together in this particular effort at this time.

I want to commend the incorporation of their support and their interest and their talent in the Nation's historic background. We are moved a lot by that history. But as Senator Craig has indicated, we also are having to deal with existing laws that are on the statute books, both on the Federal and the State level.

I want to take this occasion also to commend Governor Andrus, Governor Roberts of Oregon, Governor Andrus of Idaho, Governor Stevens of Montana, and Governor Gardner of Washington State, for without their full and total support we would not have reached the first level of a very small step that gives us hope to continue the process.

Senator BRADLEY. Thank you very much, Senator Hatfield.

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Let me thank the panel very much for its testimony. Over the course of the previous two panels and particularly listening and knowing Senator Craig's intense interest in this, I wonder if there are not some things that could accomplish the objective without some of the concerns that have been expressed by some of the earlier witnesses.

Let me ask the panel generally. As I look at this, the question is, you have rights. It is Senator Craig's clear statement of intention that he does not want to endanger those rights. You want also to preserve the maximum amount of salmon, and I think generally it is the intent of most of us to make sure that there is sufficient water for fish and wildlife.

At the same time, there are concerns about modifying the whole licensing process. My question to you is, would you support an amendment to the Federal Power Act that recognized that the FERC would have to respect all water rights, both in-stream and out of stream?

It seems to me that that might be a way to begin to look at this issue that could be helpful, meaning that the State could then establish certain in-stream water rights that would require a certain amount of water in the stream, that could not be overridden by FERC.

Would you give us your opinion? I am kind of springing that on this panel because it kind of just occurred to me, but if you have any—so I am putting the remaining panels on notice that you will probably be asked that question.

Mr. JACKSON. Senator, are you asking whether or not, say during critical periods of migration, for instance, that the projects take whatever action is necessary to enhance the passage of fish?

Senator BRADLEY. Yes, that is one possible way. But I mean, it is a little more general, stating that the FERC could not override the State water rights, whether it is consumptive or whether it was in-stream.

Mr. JACKSON. I think for Warm Springs one thing that maybe could be helpful would be some sort of language that would clearly state whether or not our rights are affected by this law, like an exclusion. Even sometimes that does not work, because Public Law 280 clearly stated that we had our own capable justice system on the reservation.

Senator BRADLEY. No, I know. I understand that sometimes when we are dealing with water law 1 plus 2 does not equal 3. I found out with Animas-LaPlata.

Yes?

Mr. STRONG. I was going to defer this question to our attorney over here, Mr. Jim Noteboom.

Mr. NOTEBOOM. My name is Jim Noteboom. I am an attorney for the Warm Springs Tribe.

There are two fundamentally different issues that the tribes are concerned about on this bill. The first one deals with on-reservation and the potential extension of State jurisdiction onto the reservation. So we realize the bill does not impact Indian water rights, but the ability to administer Indian water rights may have a tremendous impact on their value.

Just as the State may not be very happy to have the tribes administer all State water rights, the tribes are very concerned when the State can begin to administer Indian water rights. So that is one aspect.

Then there is the aspect of the off-reservation impact of this bill. That deals with treaty fishing rights. That deals with very different issues. And the examination that has to take place, as Mr. Jackson indicates, is one, what impact would this have on the off-reservation treaty rights, and I think that would have to have some study. I am not sure that I am prepared at this short notice to say that.

And then two, what about the issue of this extension of State jurisdiction or the ability to administer water rights on the reservation? I do not think that deals with that question.

Senator BRADLEY. That is very helpful. That is very helpful. I appreciate that clarification.

Let me ask just one more question. Right now FERC is required to give deference to Indian tribes' recommendations on licenses. If this bill passed as it is now written, what obligations would States have to address Indian rights?

Mr. NOTEBOOM. I believe they cannot act——

Senator BRADLEY. I am not a lawyer, either. So if that is a legal question——

Mr. NOTEBOOM. They cannot act in derogation of those rights, and that is what has generated much of the litigation over the past 27 years. I think part of the feeling of the tribes is that we have fought for many years in ECPA and Northwest Power Planning Act and all these other pieces of legislation. I mean, it has been decades worth of lobbying and legislation and talk, and this threatens to change that whole balance. We have a system now that we believe is reasonably workable.

Senator BRADLEY. Mr. Nash, anyone else have anything else to say?

[No response.]

Senator BRADLEY. We thank you very much for your testimony.

The next panel consists of: Gerald R. Garman, Deputy Superintendent of Seattle City Light, for the Public Generating Pool; Robert J. Haywood for Edison Electric Institute; Jerome C. Muys for National Hydropower Association.

We are coming down the stretch, gentlemen, so if you can limit your comments to 5 minutes. If you could even give back a minute or two, I know that the next panel will be appreciative. And we will probably ask the questions anyway.

Mr. Garman.

STATEMENT OF GERALD R. GARMAN, DEPUTY SUPERINTENDENT, SEATTLE CITY LIGHT, SEATTLE, WA, ON BEHALF OF THE PUBLIC GENERATING POOL

Mr. GARMAN. Mr. Chairman, members of the committee:

My testimony is on behalf of the Public Generating Pool and the City of Seattle City Light Department. Today I am summarizing my written testimony in opposition to S. 106 and I ask that the written testimony be put on the record.

Senator BRADLEY. Your statement will be put in the record.

Mr. GARMAN. The Public Generating Pool is also a member of the American Public Power Association and APPA had been due to testify here today but, due to a conflict, was not able to, and I am therefore asking that APPA's written statement opposing S. 106 also be put on the record.

Senator BRADLEY. It will be included in the record.*

Mr. GARMAN. There have been efforts to undo the *Rock Creek* decision legislatively and there appear from our standpoint to be two main assumptions driving this. We think neither one is correct.

The first notion is that environmental values are going to receive better treatment by the States than they will by FERC. The fact is if Congress allows S. 106 to become law each State will act in its own interest, resulting in disjointed, uncoordinated operation of the rivers and more environmental degradation than would be the case with coordinated operation.

The other notion seems to be that the States must be permitted to protect themselves unilaterally, because others are going to run roughshod over them. Again, we believe that exactly the opposite is true. If each State is free to ignore the impacts of its own actions on other States, the States will soon find themselves on the receiving end of those same unilateral, self-centered actions.

The attempts to unravel the coordinated hydro licensing system in the wake of *Rock Creek* is not just some theoretical debate about federalism or States' rights or bureaucratic prerogatives. Individual States are required by their own laws to administer their water resources for the benefit of their citizens. Coordinated river systems could not operate with their present effectiveness if they were hampered by actions handled by each individual State.

In the Pacific Northwest, we have more than 120 hydroelectric projects owned by private utilities, publicly owned utilities, and the Federal Government. These projects are operated as a coordinated system. I want to describe just one of these projects to show the interrelated problems which must be addressed during the licensing process.

The Priest Rapids Dam on the Columbia provides a classic example of the importance of the unified FERC licensing system and the mediation responsibilities now in place. The 1955 project license provided for minimum flows which had to be coordinated with releases from upstream Federal and non-Federal dams.

When it determined the minimum flows for Priest Rapids, FERC had to balance interests such as fish and wildlife, archaeological values, travel rights, flood control, navigation, power production, and recreation, as well as the need to provide enough water for the cooling facilities at the Hanford nuclear projects immediately downstream.

State fisheries agencies later petitioned FERC to amend the Priest Rapids license to increase the minimum flows almost twofold. If the States had had the unilateral right to mandate these flows, the PUD, which owns the project, would have been placed in a position of releasing water it did not have, since the Priest

* The APPA statement appears in the appendix.

Rapids project relies totally on the release of water from the Grand Coulee project, a Federal dam, for its operational water.

With the help of FERC administrative law judges, Grant PUD, and the State fisheries agencies reached several interim agreements and ultimately reached a long-term settlement agreement that was satisfactory to all parties. The parties involved in this settlement, approved by FERC and conducted under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service, the Oregon Department of Fish and Wildlife, the Bonneville Power Administration, the Chelan, Douglas, and Grant County Public Utility Districts, and three sovereign Indian tribes which have treaty fishing rights and are not in most respects subject to State jurisdiction.

Each year the coordinated planning process in the Pacific Northwest must choreograph for all of the system more than 120 projects.

Senator BRADLEY. Mr. Garman, you have about another 30 seconds.

Mr. GARMAN. We cannot do this coordination, crossing both national as well as State boundaries, with a river system where we would have a fragmented licensing process, and therefore we are testifying in opposition to this legislation.

Thank you.

[The prepared statement of Mr. Garman follows:]

PREPARED STATEMENT OF GERALD R. GARMAN, DEPUTY SUPERINTENDENT, SEATTLE CITY LIGHT, SEATTLE, WA, ON BEHALF OF THE PUBLIC GENERATING POOL

Mr. Chairman and Members of the Committee: I am Gerald R. Garman, P.E., the Deputy Superintendent of the City of Seattle, City Light Department (Seattle City Light). I am submitting this testimony in opposition to S. 106. My testimony is on behalf of the Public Generating Pool (PGP) and Seattle City Light. Seattle City Light is one of the largest municipal utilities in the country, with three hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC), having a total capability of 1,836 MWs. Seattle also operates seven other hydroelectric projects with a capability of 204 MWs, for a combined total of 2040 MWs. The Public Generating Pool is a group of eight publicly-owned generating utilities located in the states of Oregon and Washington. The PGP utilities own hydroelectric facilities licensed by FERC having a total nameplate rating of approximately 7,000 MWs. They directly serve nearly 600,000 retail accounts, and sell power to many other utilities which serve millions of additional customers.

As the Committee knows, last year the United States Supreme Court decided the case of *State of California* v. *Federal Energy Regulatory Commission*, known as the "Rock Creek case". That case made no new law. It simply upheld fifty years of case law, reiterating that the Federal Power Act created a unified, one-stop approach to licensing of hydroelectric projects. Congress has consistently taken the approach that all concerns and issues need to be brought to the same table in the licensing process, with a single decision-maker weighing them and deciding whether, and under what conditions, a license will be issued. Some of the states had wanted to unravel the unified approach that Congress has taken, arguing that existing law allowed for a piecemeal approach to licensing. They wanted to assert their own authority to over-rule the FERC decision with regard to certain issues addressed in the course of reviewing a license application. Such a piecemeal approach to licensing issues would never work. Congress has always recognized this in the system it has mandated for licensing of hydropower projects, and the court so held.

Subsequently, there have been efforts to undo either directly or indirectly, the *Rock Creek* decision. There appear to be two main assumptions driving this effort. Neither are correct. The first notion is that environmental values will receive better treatment by the states than they will from FERC. The fact is that disjointed, uncoordinated operation of the rivers will result in more environmental degradation than will be the case with coordinated operation. Further, by law FERC must ex-

plicitly consider environmental values in the licensing process. It is the PGP's experience that FERC takes this charge very seriously and has carried through faithfully and conscientiously with this mandate.

The other notion seems to be that states must be permitted to protect themselves unilaterally because others will run roughshod over them during the licensing process. Again, exactly the opposite is true. If each state is free to ignore the impacts of its own actions on other states, the states will soon find themselves on the receiving end of the unilateral self-interested actions of other states, not just on the giving end of their own actions.

The attempts to unravel the coordinated hydro licensing system in the wake of the *Rock Creek* decision are not just some theoretical debate about federalism or state's rights or bureaucratic prerogatives. The question is whether Congress is going to allow any disgruntled player, who does not get its way at the decision table with all other interested players, to get a second or third chance to get its way by obtaining a *de facto* veto power, either directly or indirectly. The two main proposals to date are a direct unraveling of the Federal Power Act, as proposed in S. 106 by Senator Craig, or a back door attack through somewhat more innocuous looking modifications to section 401 of the Clean Water Act, as proposed by Senator Jeffords in S. 812. The operational impacts on the rivers are equally devastating under either approach.

The practical import of S. 106 is straightforward. The states want the absolute power to protect localized water-related interests such as fisheries. State agencies want to achieve this absolute power by imposing mandatory conditions such as minimum flow requirements at federally-licensed hydroelectric dams. Such state mandatory conditioning power would upset the present approach of balancing diverse interests which Congress has directed to be performed at the federal level. In many cases it would allow a state a *de facto* veto over a project which FERC finds to be in the public interest.

The present system of comprehensive federal regulation is absolutely necessary in the complex multi-state coordinated setting of the Pacific Northwest. Regulation of conditions such as minimum flow can have impacts far beyond an individual project and can affect projects and interests in other states and Canada.

From the very beginning point of hydropower regulation, Congress has chosen to vest final authority for determining the conditions of hydroelectric project licenses in the agency now known as the Federal Energy Regulatory Commission. Congress deliberately did not give the states veto power over license conditions which FERC has determined to be in the public interest.

Individual states are required by their own laws to administer their water resources for the benefit of their own citizens. Coordinated rivers systems could not operate with their present effectiveness if they were hampered by unilaterally-imposed license conditions designed to benefit the local interests of individual states.

Heretofore, Congress has never allowed the licensing process to be subjected to that kind of strain. Congress provided in the Federal Power Act a comprehensive regulatory scheme in which competing interests are balanced and accommodated under FERC's authority. When it recently amended the Federal Power Act in the Electric Consumers Protection Act of 1986, Congress provided an enlarged role for the states by institutionalizing the role of recommendations made by state regulatory agencies. However, it deliberately chose not to disturb the provisions of the Federal Power Act which preclude the states from having independent power to impose project license conditions based on regulatory laws.

Existing Federal law provides for meaningful state participation in decisions about hydroelectric power. However, Congress has never allowed the final decisions about project licenses to be in the hands of the states. Rather, it has assigned to FERC both the responsibility to carry out federal policies and the ultimate authority which is necessary to meet that responsibility. That is the current state of the law, as affirmed in the *Rock Creek* decision by the Supreme Court.

THE PACIFIC NORTHWEST HYDROELECTRIC SYSTEM IS A COMPLEX AND COORDINATED SYSTEM

In the Pacific Northwest more than 100 hydroelectric projects are operated as a coordinated system. Some examples will illustrate the interrelated nature of the problems which must be addressed during the licensing process. These projects had to accommodate many competing interests through coordination under unified authority. S. 106 would destroy the ability to engage in such coordination and protect this broad range of diverse interests by giving a single-interest override, or *de facto* veto power to each individual state.

Wells Dam, licensed to the Douglas County, Washington, Public Utility District in 1962, is one of 11 dams located on the main stem of the Columbia River, some upstream, some downstream, some federal, some non-federal. The volume of the Columbia's flow in the Pacific Northwest states depends in large part upon the operation of Canadian dams and reservoirs. The Wells dam and reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and private lands under the jurisdiction of various municipalities and the State of Washington. All these dams and reservoirs are coordinated by hydroregulation under the existing Pacific Northwest Coordination Agreement.

The Wells license requires coordination with other facilities, with utilities in Washington, Montana and Oregon, and with the Corps of Engineers, the Bureau of Reclamation and the Bonneville Power Administration. Under the terms of the license FERC can, if necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game, among others, participated before FERC in developing the details of that requirement. The license also recognized that the reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires Douglas County Public Utility District to reimburse the Corps if that encroachment should interfere with power production at Chief Joseph.

The license addresses many competing interests. Those interests include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife, archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system.

The license also prescribes, for flood control, how the dam will be operated in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

This coordinated consideration of diverse interests would not be possible with piecemeal regulation, or *de facto* vetoes by any party which did not get as much as it wanted in the licensing process.

The history of Priest Rapids Dam provides another example of the importance of FERC's authority. The license for Priest Rapids, issued in 1955 to the Grant County, Washington, Public Utility District, provided for minimum flows of 36,000 cubic feet per second (cfs). These flows had to be coordinated with releases from upstream publicly-owned federal dams (Grand Coulee and Chief Joseph) as well as other upstream mid-Columbia dams such as Wells, Rocky Reach, Rock Island, and Wanapum. When it determined the minimum flows for Priest Rapids, FERC had to balance, along with all of the interests described in the previous discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford nuclear projects at the Hanford Nuclear Reservation immediately downstream.

State fisheries agencies later petitioned FERC to amend the Priest Rapids license to increase the minimum flows to 70,000 cfs. With the help of FERC Administrative Law Judges, Grant County Public Utility District and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests, and ultimately reached a long-term settlement agreement.

The parties involved in this settlement, approved by FERC and conducted under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service, the Oregon Department of Fish and Wildlife, the Bonneville Power Administration (BPA), the Chelan, Douglas and Grant Public Utility Districts, and three sovereign Indian Tribes which have treaty fishing rights and are not, in most respects, subject to state jurisdiction.

Since the early 1960's, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated in a way that provides substantial benefits to the public in the Pacific Northwest states and in Canada. The parties to the Pacific Northwest Coordination Agreement include 15 public and investor-owned utilities that own and operate hydroelectric facilities as well as the Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over a hundred hydroelectric plants, including 21 projects owned and operated by the United States government. Many of these projects are on the Columbia River and its tributaries; the rest are located throughout the Pacific Northwest. Because the BPA is a member of the coordinated system, any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

In the Pacific Northwest, unlike many other areas of the country, the benefits of a large portion of the annual water runoff must be captured within a short time or be lost forever. Taking such constraints into account, the coordinated system achieves a delicate balance among utility load requirements, reservoir storage capacity, and streamflow needs.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, such things as minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around the turbines, maximum outflows, tail water restrictions, irrigation needs and the specific operational constraints of each of the projects.

The result is a regional system which is coordinated electrically, hydraulically, contractually and economically.

Unilaterally imposed, single purpose constraints, such as minimum flow requirements, reduce the system's flexibility and can have a substantial impact on the ability of the system as a whole to optimize all competing uses. Such requirements affect not only the individual project upon which they are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across state and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow requirements based on legally-mandated local self-interest the result would be the disruption of the economic viability of projects hundreds of miles downstream and the prospect of major damage to Pacific Northwest fisheries.

THE FEDERAL HYDROELECTRIC REGULATORY SYSTEM IS OPERATING AS CONGRESS INTENDED AND SHOULD NOT BE UNRAVELED

The Federal Power Act is a comprehensive scheme of regulation which requires FERC to balance multiple interests, including those of the state and federal governments. Section 10(a) of the FPA requires that FERC consider not only hydropower but also other beneficial uses in its determination of the public interest.

In its licensing proceedings FERC not only considers a wide variety of issues, but considers these issues from the perspectives of many parties. The breadth of FERC's Congressionally-mandated concern with the public interest contrasts markedly with the interests of individual states which necessarily are more localized and parochial. For example, the Water Resources Code of the State of Washington provides:

> It is the purpose of this chapter to set forth fundamentals of water resource policy for the state to ensure that waters of the state are protected and fully utilized *for the greatest benefit to the people of the state of Washington.* Wash. Rev. Code Sec. 90.54.010 (emphasis added)
>
> Allocation of waters among potential uses and users shall be based generally on the securing of the *maximum net benefits for the people of the state.* Wash. (Rev. code Sec. 90.54.020(2) (emphasis added)

The Montana Water Use Code embodies that state's policy to

> . . . provide for the wise utilization, development, and conservation of the waters of the state *for the maximum benefit of its people* . . . Mont. Code Ann. Sub 85-2-101(3) (emphasis added)

Similarly, Oregon's water resources policy is to be guided by a legislative finding that:

> The maintenance of the present level of the *economic and general welfare of the people of the state and development of this state for the increased economic and general welfare of the people thereof* are in large part dependent upon a proper utilization and control of the water resources of this state . . . Or. Rev. Stat. Sec. 536.220(1) (emphasis added)

FERC properly takes the states' local interests seriously in its licensing proceedings. However, Congress has not chosen to allow local or parochial interests to be the basis for giving individual states a veto power over hydroelectric projects which FERC has determined are in the interest of all the public. Instead, as the U.S. Supreme Court has noted, Congress in the Federal Power Act created detailed provisions which "leave no room or need for conflicting state controls." 328 U.S. at 181.

Recent Congressional action evidenced a continuing intent that FERC, not the states, be responsible for and have final authority for performing the licensing function. The Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495 (October 16, 1986) added Section 10(j) to the Federal Power Act. That new provision

requires that each license issued by FERC include conditions for protection and enhancement of fish and wildlife. 16 U.S.C. Sec. 803(j). Those conditions be based on recommendations of the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies unless FERC specifically finds that those recommendations are inconsistent with the governing law. 16 U.S.C. Sec. 803(j)(2). Thus, Congress, by adding that requirement to the Federal Power Act, continued to reject granting the states a "veto over a project," but rather chose to require "heavy reliance and acceptance by FERC, except in limited circumstances," of agency recommendations. H.R. Rep. No. 99-507, 99th Cong., 2d Sess. p. 22 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2496, 3509. Although Section 10(j) "upgrades statutorily the importance and status of fish and wildlife recommendations," they nevertheless remain " 'recommendations,' not mandatory requirements." H.R. Rep. No. 99-934, 99th Cong., 2d Sess. p. 25 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2537, 2541. Under new section 10(j), remains empowered to decide license terms and conditions (*id.* p. 23, reproduced at p. 2540).

Both before and after the enactment of ECPA, the states have participated in decisions about hydroelectric power by allocating priorities to water rights within their jurisdictions and by advancing and advocating localized interests in the FERC licensing process. The debate is not whether those interests will be protected. FERC is required to, and does, take them into account in the Congressionally-mandated balancing process. But the ultimate balance must be struck at the federal level, as provided in the FPA, without threat of additional conditions which a state might unilaterally impose based on purely local state interests.

Congress should not jettison its long-standing unified approach to licensing decision-making by permitting any backdoor attack on its existing one-stop decision system through enhancements, clarifications or other shenanigans in the name of Sec. 401 of the Clean Water Act, or through direct amendment to the Federal Power Act. We urge Congress to reject this narrow-interest attack on the balanced system which now exists under the Federal Power Act.

Senator BRADLEY. Thank you very much, Mr. Garman.

Mr. Haywood.

STATEMENT OF ROBERT J. HAYWOOD, VICE PRESIDENT, POWER, PLANNING AND CONTRACTS, PACIFIC GAS & ELECTRIC, SAN FRANCISCO, CA, ON BEHALF OF THE EDISON ELECTRIC INSTITUTE

Mr. HAYWOOD. Mr. Chairman, members of the committee: I am Robert Haywood, Vice President responsible for electric power supply planning and acquisition for Pacific Gas and Electric Company, and I am testifying on behalf of PG&E and the Edison Electric Institute in opposition to S. 106. Written testimony has been submitted for the record and my remarks here summarize that testimony.

EEI is the national association of investor-owned electric companies, whose members supply 78 percent of the electricity used in this country. About 30 million kilowatts of hydroelectric capacity are used by investor-owned utilities nationwide to serve their customers.

PG&E is America's largest investor-owned electric and gas utility and we serve a population of about 12 million people in northern and central California. PG&E has more hydroelectric capacity than any other nongovernment organization, a total of about 4 million kilowatts on average, and it generates 20 percent of its electricity from hydroelectric power.

S. 106 has been offered to correct what is supposedly a sudden intrusion on States' water rights resulting from last year's U.S. Supreme Court decision in the *Rock Creek* case. Yet this case changed absolutely no States' rights. It only confirmed the balance Congress created in 1920 between States' control of proprietary water rights

on the one hand and the comprehensive regulation of hydropower by FERC on the other.

The result is that the FERC regulates the use of water for hydroelectric generation, but licensees continue to acquire rights to that water in accordance with State law. The Supreme Court merely preserved the status quo.

Consider that Congress addressed the underlying concerns here as recently as 1986 when it passed the Electric Consumers Protection Act. In ECPA Congress directed FERC to give consideration to environmental quality matters equal to that given hydropower and other types of development on rivers. ECPA also requires that FERC implement State resource agencies' recommendations on fish and wildlife issues unless those recommendations are flatly contrary to Federal law, and to date FERC has followed 90 percent of those recommendations.

There are compelling reasons why S. 106 is not needed. There are even more compelling reasons why S. 106 should be opposed. This legislation would deny consumers the benefit of this clean, relatively inexpensive source of electric power. This would result from letting the States second guess the comprehensive consideration that the FERC gives to environmental, energy, and other concerns in its licensing process.

S. 106 States that each Federal hydropower licensee would be bound by all terms, conditions, limitations, and other restrictions which a State chooses to impose on the use of water at hydroelectric projects. This would make each State's water agency the judge of whether more hydropower will be developed or even whether existing plants will continue to supply electricity to consumers and industry.

Unlike FERC, these agencies do not have to consider the need for hydropower and its economics. Nor would they necessarily consider the interstate, regional, national, and even international consequences of their decisions. This could result in an outright veto on hydroelectric projects. In some cases, State-imposed conditions and limitations would make both existing and new hydropower uneconomic.

An example of onerous conditions, take the *Rock Creek* case. The California Water Resources Control Board would have required twice as much water to bypass the generating plant as FERC actually required. To give you an idea of the impact of what that would do to PG&E, if those same conditions were imposed on PG&E's 29 licensed hydro projects, then we would lose 550 million kilowatthours of power each year, at a cost to our customers of $29 million per year to replace that power.

Even if a project survived licensing or relicensing under S. 106, the States would be able to change the terms of their water permits at any time within the Federal license period. This flies right in the face of the certainty that a FERC license is supposed to provide. This uncertainty would make financing hydropower projects very difficult and probably impossible.

The result is that S. 106 threatens to reduce substantially the Nation's supply of hydroelectricity.

Senator BRADLEY. Mr. Haywood, if you could, in about 30 seconds.

Mr. HAYWOOD. Okay.

Hydroelectricity is a dependable, low cost, renewable, domestically produced energy supply and is very important both for the Nation and for the State of California.

S. 106 therefore detracts from Congress' hard efforts to enact a comprehensive energy legislation, and therefore we appear in opposition to S. 106.

Mr. Chairman, thank you for the opportunity to appear here today.

[The prepared statement of Mr. Haywood follows:]

PREPARED STATEMENT OF ROBERT J. HAYWOOD, VICE PRESIDENT, POWER, PLANNING AND CONTRACTS, PACIFIC GAS & ELECTRIC, SAN FRANCISCO, CA, ON BEHALF OF THE EDISON ELECTRIC INSTITUTE

Mr. Chairman and Members of the Committee: My name is Robert J. Haywood and I am Vice President, Power, Planning and Contracts of Pacific Gas and Electric Company (PG&E). I am testifying today on behalf of PG&E and the Edison Electric Institute (EEI).

PG&E is the nation's largest investor-owned electric and gas utility, serving about 12 million people in northern and central California, a service area of 94,000 square miles. We provide over 70 billion kilowatt-hours of electricity per year to our customers from a diverse mix of generating resources: hydroelectric, fossil-fuel, nuclear, and alternative technologies such as wind power, solar power and biomass. PG&E has more hydroelectric capacity than any other non-governmental organization.

EEI is the national association of investor-owned electric companies. Its members generate approximately 78 percent of all the electricity in the United States and service 74 percent of all ultimate-use customers in the nation. About 30 million kilowatts (kW) of hydroelectric capacity are used by investor-owned utilities nationwide to serve their customers.

EEI and PG&E are strongly opposed to S. 106. If passed, S. 106 has the potential:

- to force some existing hydropower projects out of operation,
- to substantially reduce the power generating capability of other existing projects when they are relicensed,
- to compromise or destroy the operational and economic viability of hydropower projects at any time after they have been licensed or relicensed, and
- to deter the licensing of any new projects.

It would effectively replace a federal licensing process which has served the nation's electric consumers well for over 70 years. S. 106 is aimed at the administration of the use of water at hydropower projects, not States' water rights. If enacted, it would allow States to regulate hydropower projects just as extensively as Congress has authorized FERC to do, even though states would not be required, as FERC is, to consider either the overall affect on electricity supply or the consequences to other states. S. 106 would create a dual system which would at least produce conflicting requirements for projects and at worst would result in States vetoing projects that FERC otherwise would license as being in the national interest.

My statement explains the importance of hydropower to this nation and to PG&E, why S. 106 is simply not needed, and why S. 106 would seriously disrupt the nation's hydropower resources.

THE IMPORTANCE OF HYDROPOWER

As a dependable, relatively inexpensive, clean, renewable, domestic source of energy, hydropower plays an extremely important role in the nation's energy mix. Last year, it supplied 10% of the nation's electric energy, and it represents about 12% of our electric power capacity. At PG&E, hydro is one of the most important components of our diverse resource mix, at about 3.9 million kilowatts of capacity. Hydroelectric plants provide about 25 percent of our capacity and roughly 20 percent of our energy production in a year with normal rainfall. Even in a dry year, hydropower can be counted on for at least 8 to 10 percent of our energy production.

Hydropower also has unique operational advantages. It can be brought "on line" rapidly, and its output can be "ramped" up or down very quickly to track every change in energy demand during the course of a day. Reservoirs at projects can store water for hours, days, or months and then use it to generate power when it is of highest economic benefit to consumers of electricity. Used in a system with major

thermal generating plants, hydroelectric plants can maximize the operating flexibility and efficiency of those plants by meeting peak energy needs while the thermal plants supply baseload power.

Another significant operating benefit of hydropower is its use as pumped storage. This use extends hydropower's contribution to operational flexibility even further by using relatively cheap energy generated in off-peak hours, e.g., late at night, to pump water up into a reservoir. Then that water can be run through the generators during the time of peak demand in the daytime, when its value is greatest. For example, PG&E's Helms Pumped Storage Project combines the ability to generate 1.2 million kilowatts of electricity to help meet peak electrical demand with the ability to absorb a comparable amount of electric output during non-peak periods by switching to its pumping mode. This enables efficient baseload generation sources to operate around the clock, even during the otherwise low-load off-peak periods. In addition, this huge plant can go from no load to full load in just 5 minutes.

Hydropower's economic benefits to electric customers are significant. Because its "fuel" is inexpensive, hydropower is a relatively low cost source of electric power. Average hydro production costs are significantly lower than most thermal alternatives. As a major component of our nation's resource mix, hydro helps to moderate increases in the price of electric power when utilities add new resources. As a domestic resource, it helps promote America s energy security.

Additionally, hydropower provides societal benefits at its reservoirs in the form of flood control, navigation, fish and wildlife enhancement, aesthetics, and recreational appeal to millions of Americans. PG&E has been in the hydropower business since the late nineteenth century. Our oldest, currently operating hydro unit was commissioned in 1900 and our newest in 1986. We have over 80 public recreation facilities at hydro projects, used by about 400,000 visitors annually.

THE "ROCK CREEK" CASE AND STATES' WATER RIGHTS

S. 106 would overturn the Supreme Court's *Rock Creek* decision, in which the State of California asked the Court to change its interpretation of the Federal Power Act (FPA) regarding State vs. federal authority over the use of water at hydropower projects.[1] Proponents of the bill argue that the rights of States were diminished or threatened by this decision. That is simply not the case because *Rock Creek* changed no States' rights. It only confirmed the balance Congress created in 1920 between States' control of proprietary water rights on the one hand and the comprehensive regulation of hydropower by FERC on the other. *Rock Creek* ensures that the careful balance which has been in effect for 70 years will be preserved. In fact, in *Rock Creek*, the Supreme Court merely affirmed its decision originally made in 1946 in the *First Iowa* case,[2] that the States retain the power under the FPA to decide how water rights will be created, allocated, traded and extinguished for various uses. The Court's unanimous decision stated:

> There has been no sufficient intervening change in the law, or indication that *First Iowa* has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent. 110 S. Ct. at 2029-30.

Justice O'Connor, writing for the Court, also noted Congress' affirmation of this balance of the critical issues of hydro licensing in the passage of the Electric Consumers Protection Act of 1986 (ECPA):

> By directing FERC to consider the recommendations of State wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations) Congress has amended the FPA to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role. *Id.* at 2030.

Looking at the careful record before it, the Court could clearly see the conflict from the State's proposed action:

> FERC set the conditions of the license, including the minimum stream flow after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the bal-

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[1] *California* v. *F.E.R.C.*, 110 S. Ct. 2024 (1990).
[2] *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152 (1946).

ance embodied in that considered federal agency determination. *Id.* at 2033-34.

States retain full ability to regulate water rights and water usage for domestic, irrigation, and other consumptive uses of water. Hydroelectric licensees must still comply with State law in acquiring water rights. It is only the use of water for hydroelectric generation (a non-consumptive use) pursuant to a FERC license for which the state may not impose conditions more stringent than those set by FERC.

Additionally, the *Rock Creek* decision did not adversely affect a States ability to protect its fish and wildlife resources. State resource agencies remain active and vital participants in the FERC licensing process. License applicants are required to consult with State agencies to clearly identify their concerns at an early stage of the licensing process and to work to resolve those concerns in a mutually agreeable manner. FERC is statutorily required by the ECPA "to give *equal consideration* to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat); the protection of recreational opportunities; and the preservation of other aspects of environmental quality." (16 U.S.C. § 797(e) (emphasis added). ECPA also requires FERC to implement State resources agencies' recommendations on fish and wildlife issues unless those recommendations are flatly contrary to federal law. To date, FERC has followed over 90% of these recommendations.[3] In those cases where FERC does not adopt such recommendations, it must make a specific finding explaining its decision. 16 U.S.C. § 803(h)(2).

The FPA also expressly requires applicants for hydropower licenses at FERC to show they have the proprietary water rights needed under State law to meet all federal regulatory requirements for safe, environmentally sound and economical operation of a project. FERC itself cannot grant these rights to a licensee.

The issue in *Rock Creek* was not who controls water rights or who would be the better environmental advocate. The issue was who has jurisdiction over federally licensed hydroelectric projects. In the FPA, Congress wisely created a procedure under which development of the nation's hydroelectric power resources can proceed in a prudent and carefully considered manner, administered by a single agency with clear, comprehensive authority to assure consistent environmental protection and wise hydropower resource use. Since *Rock Creek* did not invade any States' rights and since as recently as 1986 (in ECPA) Congress addressed concerns for more attention to environmental quality issues in licensing, there is no need for S. 106.

S. 106 PLACES HYDROELECTRIC POWER AT RISK

S. 106 places the current and future benefits of hydropower in jeopardy. If this nation is seriously interested in maintaining and promoting this clean, renewable, domestic source of energy, it needs to ensure stable, efficient, and predictable regulatory treatment by a single federal agency with authority to address the concerns of various State and other relevant agencies.

S. 106 would give States a new power to administer use of water rights for hydropower projects, including "any terms, conditions, limitations, or other restrictions which a State may attach to such water rights for such projects." The bill would rewrite the law in place since the FPA was passed in 1920, by singling out control over the use of water for hydroelectric generation as a new authority to be given to the States. As far as I can tell, this new authority would be as broad as FERC's licensing power, since there is no limit to the kind or number of requirements or limitations a State water agency could insert in a water rights permit for a hydropower project. This could happen before FERC issued a license for a project or even at any time during the term of a license. In imposing these conditions, States would be free to ignore interstate, regional, Indian, national and international concerns. These conditions and limitations, in most States, will be specified by a water resources agency which has no mandate or obligation to consider the tradeoffs between the need for hydroelectric power and other considerations like recreation or fish and wildlife. Contrast this with FERC, which has exactly that broad a responsibility under the FPA. After ECPA, this responsibility is stronger than ever before, given the now-explicit licensing requirement to give equal consideration to power and environmental concerns.

With each state deciding in detail how water will be used in each hydropower project being licensed or relicensed, license applicants will be caught between two or more parallel but unrelated licensing processes. Multiple processes, with different

[3] R.T. Hunt, "Lessons Learned In Hydro Relicensing, 1984-89: Trends, Costs and Recommendations," Electric Power Research Institute Report No. GS7324, May 1991.

standards and timetables, and with different and often conflicting resulting terms and conditions, will create a bureaucratic obstacle to licensing hydropower projects and promote litigation. This would impede the relicensing of existing projects and discourage new development.

A far worse result of S. 106 is that the substantive outcome of State permit processes could render proposed or even existing hydropower plants uneconomic, or at least substantially reduce the benefits they can supply to consumers. There is nothing in this bill that would prevent a State from vetoing either a new or existing project outright, even if FERC would otherwise issue a federal license. Passage of S. 106 in the worst case might tempt States even to attempt to shut down or curtail operations at existing projects during the term of previously-issued FERC licenses.

Because State agencies likely will not look beyond water uses, the conditions and limitations they impose will almost certainly create harsher requirements for such things as minimum flow releases, reservoir operations and perhaps even required facilities than what the FERC would specify after carefully considering these tradeoffs in the public interest.

For example, in the *Rock Creek* case itself, the California Water Resources Control Board would have required twice as much water to bypass the generating plant as the FERC actually required. To give you an idea of the impact of this difference, if the same Board could use S. 106 to limit production at PG&E's 29 licensed hydro projects in the same way, PG&E would lose 547 million kilowatt-hours (kWh) of power each year, and the cost to our customers would be an extra $29 million per year to replace that power.

To give you another example, under S. 106, Southern California Edison Company (SCE) would lose 10 percent of the power output of a single project,[4] currently being relicensed, if the state resource agency could prescribe minimum stream flow releases. The state has proposed minimum flows far greater than the United States Forest Service and SCE. In its environmental assessment, FERC concluded that the State agency's recommendations were excessive because the flows recommended by SCE and the Forest Service would fully protect the relevant environmental values.

Hydroelectric generation is very capital intensive, so large investments need to be justified up front for new projects. Even for existing projects needing a new license, the licensee and any competitors have to look not only at the operating costs of the existing plant, but at needed capital replacements and desirable improvements.

Under S. 106, many new projects will never be built because their economic viability will be destroyed at the outset by State-imposed conditions in water rights permits. Few if any of those that survive this hurdle will be built either, if States are given the ability by this bill to change conditions at any time during the license term, in ways not constrained by the comprehensive public interest standard Congress set in the FPA. Developers will be unable to persuade the debt and equity markets to take this level of risk, not knowing what level of benefits, if any, there will be for the useful life of the project. This financing difficulty will also affect improvements and even major capital replacements for existing plants.

CONCLUSION

Passage of S. 106 would void the historical careful balancing inherent in the federal licensing process for hydropower projects to an unpredictable, conflict-ridden bureaucratic mess. Each of the States would set its own standards and rules for the development and operation of hydropower projects. Should a project be interstate in scope, it would be subject to that many more conflicting sets of rules. FERC would no longer be able to specify reliably the energy capacity of a project, to control project economics, or to reconcile the numerous factors (such as energy, economic and environmental concerns) that it now considers in reviewing license applications. Each State could limit hydropower projects within its borders without regard to how the loss of the energy would affect interstate, regional or national energy policy. The result would be a licensing morass that would make pre-Federal Power Act impediments to hydro seem mild by comparison. At a time when the nation is searching for clean, dependable, domestic sources of energy, S. 106 would be a big step in the wrong direction.

The rights of States are important. The FPA and ECPA were passed by Congress to ensure that the rights of States are protected and that their concerns are addressed each time a project is licensed. S. 106 would upset the careful State-federal balance created by these laws.

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[4] Bishop Creek Project, FERC Project No. 1394.

Hydropower is the most readily available renewable energy resource in the nation today. As the Congress works to establish a sound national energy strategy to carry us well into the 21st century, it is vital that the federal government be able to support efforts to enhance the ability of both the private and public sectors to preserve and expand this clean, renewable domestic resource.

Senator BRADLEY. Thank you very much, Mr. Haywood.
Mr. Muys.

STATEMENT OF JEROME C. MUYS, WILL & MUYS, ON BEHALF OF THE NATIONAL HYDROPOWER ASSOCIATION

Mr. MUYS. Thank you, Mr. Chairman. I am Jerome C. Muys, a member of the firm of Will and Muys of Washington, D.C., and I am testifying today on behalf of the National Hydropower Association in opposition to S. 106.

I would like to submit my statement for the record and briefly summarize it.

Senator BRADLEY. Thank you very much. Your statement will be in the record.

Mr. MUYS. NHA's members include owners and developers of hydroelectric projects from all regions of the country and all segments of the industry, as well as equipment manufacturers and legal, financial, engineering and consulting firms. We supported FERC before the Supreme Court in the *Rock Creek* case, although we took a narrower view of the preemptive effect of the Federal Power Act on State water law.

We believe *Rock Creek* correctly interpreted the act's allocation of Federal and State jurisdiction for hydropower development and that it would be unwise public policy for Congress to create a conflicting and duplicative regulatory regime in 50 States for the management of water use by hydro projects.

In 1920 Congress had two basic obstacles to achieving the comprehensive development of the Nation's river basins that the act was designed to accomplish. First, they had to find a Federal agency that had jurisdiction over the Federal land and water resources that the States lacked; and secondly, they had to find a Federal agency that could deal with the interstate problems presented by the nature of resource development in an interstate basin and the States' lack of authority to regulate that resource use in other States.

Centralizing the exclusive licensing authority in FERC solved these two problems, but enacting S. 106 would resurrect them both, to the detriment of the national interest. S. 106 has two principal defects. It is based on an overstatement of *Rock Creek's* impacts on State water laws and ignores the substantial adverse impact that balkanization of water use authority among 50 States would have on development of the Nation's hydropower.

Rock Creek's reaffirmation of *First Iowa* held only that California's minimum flow laws do not constitute either proprietary rights or rights of the same nature as those relating to the use of water in irrigation or for municipal uses, which are preserved by section 27. It did not declare the sweeping preemption of State water law that proponents of S. 106 have asserted.

For example, it plainly did not hold that a licensee need not acquire State water rights for storage or use of water for the kinds of

consumptive uses, for irrigation or municipal purposes described in section 27, or that State minimum flow laws are preempted where they do not adversely impact a proposed or existing project or are necessary to protect downstream vested water rights.

S. 106 nevertheless would radically amend the act to require applicants for an initial or a renewal license to comply with all State laws relating to water use. Its purported preservation of FERC's exclusive licensing authority is illusory, because the States would make the all-important decisions as to whether existing or proposed projects could use water at all and, if so, on what conditions.

Congress has never given the States authority to veto development of Federal land and water resources, and it would be particularly inappropriate to do so at a time when many in the country are arguing for greater reliance on renewable energy resources, such as hydropower, as part of a National Energy Strategy.

S. 106 would also overturn the Supreme Court's 1955 decision in *FPC* v. *Oregon*, the *Pelton Dam* case, which held that State water laws do not apply to a hydro project located on public lands which have been reserved for power development purposes.

Whatever one's views may be about the Federal reserved water rights doctrine, the implications of negating the water rights consequences of the automatic power site withdrawal provisions of the Federal Power Act should be carefully considered.

Finally, proponents of S. 106 have not explained how individual States could deal with the substantial problems associated with hydropower development in an interstate river basin. Although they could conceivably forge interstate agencies by interstate compact that might be able to assume some of the responsibilities now lodged with FERC, as New Jersey and the other Delaware River Basin States have done—and that is the only group of States that have really done that—those possibilities seem extremely remote.

Interstate water disputes are on the rise. There are presently pending before the United States Supreme Court three equitable apportionment disputes involving western rivers and another is brewing in the Southeast on the Chattahoochee and Coosa Rivers.

By stripping FERC of its exclusive water allocation authority for hydropower development, Congress would be returning the hydropower industry to where it was at the turn of the century. That institutional situation was not adequate then. It would be wholly inadequate now.

In conclusion, Mr. Chairman, S. 106 takes an overly simplistic approach to the complex problem of accommodating legitimate State interests in the development of the Nation's hydropower resources. NHA believes that Congress has already struck the appropriate balance. In 1986 it rejected essentially the same proposal contained in S. 106 and instead amended the act to significantly enhance the role of the States in the licensing process.

Congress has gone as far as it can to preserve State water law and policies without giving the States a veto over hydropower projects. The proposal to do so in S. 106 is neither justified nor in the national interest. If there are specific areas where the States feel that FERC has overstepped its jurisdiction, they should identify them. If and when the States do, the National Hydropower Association is prepared to discuss reasonable ways to address them.

In this regard, I want to emphasize that in my view the protection afforded vested consumptive use water rights in section 27 does not mean that they may be disregarded by FERC with impunity as long as compensation is paid for them. NHA would be receptive to discussing ways to strengthen the protection afforded such vested water rights, including amendment of section 21 to prohibit a licensee from condemning vested State water rights except where they are legally incident to land rights, as in the eastern riparian States.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Muys follows:]

PREPARED STATEMENT OF JEROME C. MUYS, WILL & MUYS, ON BEHALF OF THE NATIONAL HYDROPOWER ASSOCIATION

Mr. Chairman, my name is Jerome C. Muys, a member of the law firm of Will & Muys, Washington, D.C. I am testifying today on behalf of the National Hydropower Association ("NHA") in opposition to S. 106. NHA's members include owners and developers of hydroelectric projects from all regions of the Nation and all segments of the industry, as well as equipment manufacturers and engineering, legal, financial and consulting firms.

NHA and every institutional segment of the electric utility industry interested in hydropower development supported the Federal Energy Regulatory Commission ("FERC") in the controversy between that agency and the State of California over the scope of FERC's jurisdiction to establish conditions of water use for hydropower generation by licensees under the Federal Power Act. The Supreme Court's unanimous decision last year in *California* v. *FERC*, 110 S.Ct. 2024 (1990), the so-called *Rock Creek* case, reaffirmed that FERC held exclusive authority over that limited area of water use. S. 106 would overturn that decision.

Contrary to the assertions of the proponents of S. 106, the *Rock Creek* decision did not change the law with respect to the status of state law under the Federal Power Act. It simply reaffirmed an earlier 1946 decision that had been relied on by the hydropower industry and accepted by the states for 44 years. All that has changed is the states' attitude toward their role, which is that Congress should restructure the Federal Power Act by transferring to the states the authority to set water use conditions with respect to all existing and new hydropower projects. The issue is not one of "states' rights", as the proponents of S. 106 have simplistically characterized it, but of how to exercise the federal government's responsibility over federal lands, navigable waters and interstate commerce in a manner that will achieve a rational program for the development of the Nation's hydropower resources while giving appropriate consideration to the legitimate interests of the states in the optimum development of the waters within their borders. The *Rock Creek* decision correctly interpreted the Federal Power Act's careful allocation of federal and state jurisdiction for that purpose and it would be unwise public policy for Congress to reverse that allocation and create a conflicting and duplicative regulatory regime in the 50 states for the management of water use by licensed projects that would seriously hamper hydropower development.

A. BACKGROUND

In the Federal Water Power Act of 1920 [1] Congress ended several decades of piecemeal hydropower development on federal lands and waters subject to federal jurisdiction by vesting in the Federal Power Commission (now the Federal Energy Regulatory Commission) the exclusive authority to license projects which it determined were "best adapted to a comprehensive scheme for improvement and utilization" of a river basin for navigation, water power development and other beneficial public uses. 41 Stat. 1068 (§ 10(a)). In response to concerns expressed primarily by the western states, Congress expressly disclaimed in section 27 any intent "to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein". *Id.* at 1077, 16 U.S.C. § 821. In

[1] 41 Stat. 1063, later incorporated into the Federal Power Act in 1935, 49 Stat. 838, 16 U.S.C. § 791 *et seq.*, hereafter sometimes "the Act".

section 9(b) it also directed license applicants to present to the Commission "satisfactory evidence (of compliance) with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes . . .". *Id.* at 1068, 16 U.S.C. § 802(b).

The Supreme Court first interpreted sections 9(b) and 27 in 1946 in a controversy over whether the Commission was authorized to issue a license to an applicant that had failed to obtain a permit from the State of Iowa to divert water for the same project. In *First Iowa Hydroelectric Coop* v. *FPC*, 328 U.S. 152 ("*First Iowa*"), the Supreme Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. In reaching that decision it rejected Iowa's contention that section 27 required a contrary result, holding that it preserved only "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal uses." *Id.* at 175-76.

NHA believes that *First Iowa* correctly interpreted (1) the Federal Water Power Act as occupying the field of hydropower development and (2) section 27 as protecting all water *rights*, including those for power generation, vested under state law and preserving all preexisting state *laws* relating to the allocation and use of water for other than hydropower generation purposes, primarily irrigation, municipal and other similar consumptive uses. NHA's disagreement with California in the *Rock Creek* case centered on the kinds of state laws whose continued applicability was preserved by the first clause of section 27. We do not disagree with the *First Iowa* conclusion that the state laws preserved by that clause are those conferring rights of a "proprietary" nature.[2] But California's contention that it encompassed all state laws relating to any kind of water use, including hydropower generation, *i.e.*, that Congress intended for the Commission to regulate all aspects of licensing hydropower projects except for the use of water to run the projects, would mean that Congress labored mightily for six years to craft "comprehensive" federal licensing authority only to produce a toothless tiger.

Section 27, either in any of its early forms or as finally enacted, failed to specify power generation as one of the water uses whose control under state authority was to be preserved from supersedure. Indeed, Rep. Mondell (Wyo.), who had authored section 8 of the Reclamation Act of 1902, recognized the limited applicability of section 27:

> The only trouble about this provision is that it is not complete enough and far-reaching enough, and I shall offer an amendment to broaden its provisions. It is not as good a provision as that contained in the irrigation [Reclamation] law, which, by the way, I had the honor of drawing. It is not as broad and all-embracing a provision, but with a slight amendment, *including the word "power."* it will do very well.

51 Cong. Rec. 14070 (1914) (emphasis added). No such amendment was ever made, which is particularly significant in light of the overriding focus of the Act on hydroelectric power production.

Section 8 of the Reclamation Act referred to by Rep. Mondell read as follows at the time section 27 was adopted (32 Stat. 390, bracketed numbers added):

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, [1] and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, [2] and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: [3] Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Section 27, although patterned after the introductory portion of section 8, embodied significant modifications of the earlier language. Section 27 provides:

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[2] Proprietary rights to the use of water, including hydropower generation, can be established by general property law or, as in most of the western states and, more recently, eastern states as well, by administrative permit systems. Ausness, *Water Rights Legislation in the East, a Program for Reform*, 24 Wm. & Mary L. Rev. 547 (1983).

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

There were sound reasons for the deletion of the numbered provisions of section 8 in adapting it to the different purposes of the Water Power Act. First, the reason why clause 1 of section 8 was not carried over into section 27 to require either the Commission or its licensees "to proceed in conformity with" the state laws "saved" from supersedure under that section reflects the Act's broad purposes to promote the national development of hydropower. Inasmuch as nothing in the Act purported to require a Commission license for the use of water for irrigation, municipal or other consumptive uses, there was obviously no reason to direct compliance with such laws. Most importantly, Congress was aware of the potential for duplicative state laws to frustrate or unduly burden the operations of those projects the Commission found "best adapted" to develop the hydropower and related resources of a river basin and wisely precluded that possibility by deliberately excluding "power" from the enumerated water uses remaining subject to state law.

Clause 2 was an attempt to preserve the jurisdictional authority of the federal government and the states, as well as proprietary rights, in interstate streams. This clause would have been inappropriate in section 27 because (1) the whole thrust of the Act was to supersede jurisdiction over the use of water for hydropower generation, as well as other laws largely of a regulatory nature that relate to non-consumptive uses of water affected by a licensed project, and (2) proprietary rights were adequately protected by the vested rights language in that section.

Clause 3 plainly was inappropriate because it focused on the Reclamation Act's primary goal of securing the consumptive use of water for irrigation, whereas the 1920 Act established a new and pervasive federal regulatory regime primarily concerned with the use of water for hydropower generation, with due regard for the need to balance other competing interests.

1. Protection of Consumptive Uses

The legislative history of the 1920 Act makes it clear that the laws which Congress intended to preserve by section 27 were primarily those under which rights could be acquired for "consumptive use", *i.e.*, the consumption of water for such purposes as irrigation or municipal needs. Rep. Taylor (Colo.), author of the language ultimately enacted as section 27, emphasized that the bill was designed to enable the Commission to grant "authority to create power and utilize water for power purposes", but that "if a party appropriates water . . . for *irrigation* under State law they will have that *additional property* right in addition to the power privilege granted here.[3]

The recognition in *First Iowa* that the "other uses" in section 27 meant "uses of the same nature" as irrigation and municipal use and did not include power generation is supported not only by omission of "power" from section 27 as a specific illustrative use but by its special treatment under western water law at the time. Although power generation was then recognized as a beneficial use of water in most western states, it was generally not viewed as a "consumptive " use because it does not physically consume water, as irrigation and municipal uses do. Rather, water used for hydropower generation simply flows through a generating plant's turbines and becomes available for other uses downstream.

The reasons why section 27 did not track the language of section 8 of the Reclamation Act of 1902 highlight some of the basic differences in the two statutes. The Reclamation Act was designed for the development and consumptive use of water for relatively large scale irrigation projects. It was enacted against a backdrop of half a century of relatively small scale individual irrigation enterprises in the West under the innovative prior appropriation doctrine, with little involvement of the federal government other than to sanction local water laws and customs. *California* v. *United States*, 438 U.S., 645, 655-63 (1978). Western Congressmen and their farmer constituents, while eager to receive the federal investment in reclamation projects which would "make the desert bloom", were reluctant to do so at the price of the federal government overriding the basic elements of western water law that had provided the security of tenure in limited water supplies so essential in the arid

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[3] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 92 (1918) (emphasis added). Rep. Taylor later claimed credit for "getting section 27 put into this bill, which is the savings clause of our *irrigation* right". 56 Cong. Rec. 9115 (1918) (emphasis added).

West. Consequently, it is understandable why they fought to preserve those laws and directed the Secretary of the Interior to "proceed in conformity" with them in carrying out the new federal program.

The Federal Water Power Act was enacted against a wholly different backdrop. Hydropower generation was a relatively recent development at the time the great debate began in 1914 over federal encouragement and regulation of that industry. Moreover, the federal government was already heavily involved in that development because many projects were either located on federal land and required an occupancy permit from either the Secretary of the Interior or the Secretary of Agriculture, or else involved navigable waters, thus requiring authorization from the Secretary of War and concurrent federal legislation. Hence, the proposal to centralize the already dominant federal authority into the Federal Power Commission (initially the Secretaries of Interior, Agriculture and War) did not produce the same degree of apprehension among western Congressmen that the Reclamation Act had, particularly since the federally licensed hydropower generating projects would not involve the consumptive use of water. Consequently, the western Congressmen obviously concluded that it was sufficient to preserve only existing state laws governing the consumptive use of water and all vested water rights.

2. Instream Values

In 1920 state law, particularly in the western states whose spokesmen championed section 27, did not provide mechanisms for the acquisition of "proprietary" rights to the use of water for instream purposes such as fish and wildlife habitat, recreation and aesthetics, nor did the states exercise "regulatory" authority for such purposes.[4] Consequently, whatever authority the states possessed with respect to the creation of property rights to the consumptive use of water in 1920, and which was preserved by section 27, cannot be stretched to encompass relatively recent state laws regulating instream values, which is what California sought in *Rock Creek*.

Congress filled that gap in 1920 when it authorized and directed the Commission only to license projects that "in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water power development, and of *other beneficial uses*. . . ." (41 Stat. 1068 (§ 10(a)) (emphasis added)), uses in which the Supreme Court has observed "the Federal Government had a legitimate interest [and] which, while unregulated, might well be contradictory rather than harmonious." *FPC* v. *Union Elec. Co.*, 381 U.S. 90, 98 (1965). This mandate for "comprehensive" utilization of water for beneficial purposes has proven broad enough to cover instream values impacted by hydropower projects, and the Commission has exercised its licensing authority to balance the uses of the land and water resources of a river basin affected by such projects with other beneficial public uses of those same resources.[5] If there were any doubts about the Commission's duty to balance a broad array of values in its licensing decisions, Congress removed them in enacting the Electric Consumers Protection Act of 1986,[6] which more clearly enumerated the kinds of environmental and other values to be considered.

In summary, it is clear that the Commission has steadily become more aggressive in exercising its licensing authority to protect instream values and that, whatever the scope of state law preserved by section 27 may be with respect to conditioning consumptive use water rights to protect or promote instream values, Congress left no room for the imposition of such duplicative or conflicting conditions on the oper-

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[4] There is no mention of such uses in Wiel, *Water Rights in the Western States* 410 (3rd Ed. 1911), the classic text on western water law at the time.

[5] In *Udall* v. *FPC*, 387 U.S. 428 (1967), the Supreme Court held that the Commission had a duty to explore "all issues relevant to the 'public interest', including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife". *Id.* at 450. *See also Scenic Hudson Preservation Conf.* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

The Commission was actively using its license conditioning authority to protect and promote fish habitat and other instream values no later than the 1940's. See, *e.g.*, *Southern California Edison Co.*, 8 F.P.C. 364, 375 (1949); *Oakdale Irrigation District. et al.*, 10 F.P.C. 810, 814 (1951). Nor did the Commission hesitate to decline to license otherwise economically feasible projects that threatened what were considered to be more important environmental and recreational values of a river. See, *e.g.*, *Namekagon Hydro Co.* v. *FPC*, 216 F.2d 509 (7th Cir. 1954).

[6] 100 Stat. 1243, codified in scattered sections of 16 U.S.C.

ation of licensed hydropower projects. That remains sound policy, particularly since state law continues to be uneven in this area.[7]

B. PERMITTING STATES TO IMPOSE MINIMUM FLOW OR OTHER WATER USE CONDITIONS ON LICENSEES WOULD FRUSTRATE A FUNDAMENTAL OBJECTIVE OF THE ACT

A principal objective of the 1920 Act was to achieve "comprehensive" development of the water resources of a river basin for navigation, water power development, recreation and other beneficial uses. Congress was attempting to overcome two principal obstacles. First, only a federal agency with broad, exclusive authority to consider and balance all of the interests associated with the federal land and navigable waters, which were the jurisdictional bases for the Act, could accomplish that task. Individual states lacked authority to do so with respect to such federal interests, even within their own borders.

Second, interstate river basins presented an even more serious obstacle, since each basin state lacked authority to exercise comprehensive regulatory authority over resources located in another state, absent an interstate compact creating an interstate agency with power to do so.[8] Thus, while optimum development of the hydropower resources of an interstate basin might dictate a single high dam at a particular location in that basin, the differing interests of the individual states might lead to each state licensing one or more smaller dams in its own jurisdiction. Similarly, where a project spans an interstate boundary river, or is located just upstream of the point where a river crosses into another state or country, or dedicates all of its power for use in another state or states, in the absence of the Commission's comprehensive and exclusive licensing authority a state could impose conditions on project operations designed solely to foster its own interests.

Centralizing the exclusive licensing authority in the Commission solved the foregoing two problems, but granting control over the conditions of essential water use by licensees to the states, as S. 106 proposes, would resurrect them both. If a particular flow standard is set for waters affecting federal Indian or other reservations under section 4(e) of the Act, 16 U.S.C. § 797(e), for example, under S. 106 the state conditions would nevertheless control. Similarly, the problems under S. 106 become even more pronounced in interstate river basins, where many licensed projects are located.[9] If the Commission determines that a certain flow is essential throughout a particular reach of an interstate river, it can implement that decision on an interstate basis as it licenses individual projects, in whatever state they are located. But if S. 106 were to become the law, each state could implement its water permit system to set its own flow requirements in disregard of the policies of its neighbor states.

C. THE EXISTING ALLOCATION OF FEDERAL AND STATE JURISDICTION OVER WATER USE BY LICENSED PROJECTS

Against that backdrop of Congressional action as refined by the Supreme Court, the following allocation of federal-state jurisdiction governing hydropower licensing under the Federal Power Act has been established.

State laws governing (1) the licensing of hydropower facilities and (2) the use of water for hydropower generation have been preempted by the Federal Power Act, which has occupied that limited field by conferring on the Federal Energy Regulatory Commission the exclusive authority (1) to license hydropower facilities where the jurisdictional bases of the Act are present and (2) to set conditions of water use by the licensed project.

In determining whether to issue a license for a proposed project the Commission must balance a broad array of uses specified in section 10(a) and give consideration to a wide range of state recommendations, as well as any comprehensive river basin plan developed by the state or states where the proposed project is located. With

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[7] See National Water Commission, *Water Policies for the Future* 271 (GPO 1973); Shupe, *Keeping the Waters Flowing: Stream Flow Protection Programs. Strategies and Issues in the West* in MacDonnell, Rice and Shupe, *Instream Flow Protection in the West*, Ch. 1 (Univ. of Colo. 1989).

[8] *First Iowa* emphasized the testimony of Secretary of Agriculture Houston that "[t]he problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies". 328 U.S. at 181, n. 23.

[9] FERC, *Hydroelectric Power Resources of the United States—Developed and Undeveloped*, table 2 (GPO, 1988). Interstate problems are highlighted in the Pacific Northwest where the operations of over 100 hydropower projects, many in the interstate and international Columbia River Basin, are closely coordinated under the Pacific Northwest Coordination Agreement and Commission-imposed license conditions.

respect to state fish and wildlife recommendations, the Commission must include them in the license unless it makes formal findings that they are "inconsistent with the purposes and requirements of [the Act] or with other applicable provisions of law". 16 U.S.C. § 803(j).

Although the Federal Power Act does not expressly state the basis of the licensee's water use authority, the Supreme Court in *Udall* v. *FPC*, 387 U.S. 428, 450 (emphasis added) (1967), stated that "[a] *license* under the Act *empowers the licensee* to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, *in effect, to appropriate water resources from the public domain.*" *Id.* at 450 (emphasis added). The Court's reference to "water resources from the public domain" necessarily must be read as relating only to waters not already subject to valid vested rights under state or federal law.[10] The Act's lack of clear explication of a licensee's source of water use authority probably explains in part why many licensees have continued to seek state water permits in order to protect themselves, at least where such permits were available without conditions in conflict with their license. Such voluntary compliance at least serves as notice to the state that the licensee has federal authorization to use water for the purposes and in the manner specified in its license, thus aiding the state in the administration of other water rights on the stream.

The project license thus constitutes federal authorization to utilize waters of the project's water source, subject to prior valid vested water rights, in the quantity and manner specified in the license. By analogy to state water law, the priority date of such water use authority presumably is the date when the license application was filed, putting the states and other present and prospective water users on notice of the intended use. The relative priority of the licensee's federal water right vis-a-vis other users on a stream can be determined in state stream adjudication proceedings under the provisions of the Mcarran Amendment, 43 U.S.C. § 666, as are other federal rights. *Colorado River Water Cons. District* v. *United States*, 424 U.S. 800 (1976); *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971).

D. THE RESTRUCTURING OF THE EXISTING SYSTEM PROPOSED BY S. 106

S. 106, which would dismantle the Federal Power Act's longstanding, carefully constructed system, has two principal defects. It is based (1) on an interpretation of the *Rock Creek* decision which overstates its impact on state water laws, and (2) evidences no concern over the adverse impact that such "Balkanization" of water use authority among the 50 states would have on development of the Nation's hydropower potential.

The Court's unanimous *Rock Creek* decision reaffirming *First Iowa's* interpretation of section 27 held only that California's laws relating to minimum stream flows do not constitute either "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal uses". Consequently, it rejected California's attempt to impose conflicting minimum flow conditions on a licensee which would have made the project economically infeasible. It did not find the sweeping preemption of state water law that proponents of S. 106 have asserted. For example, it plainly did not hold that a licensee need not acquire state water rights for storage or use of water for the kinds of *consumptive* uses described in section 27 or that state minimum flow laws are preempted even where they do not adversely impact a proposed or licensed project.

S. 106 nevertheless would radically amend the Federal Power Act to require an applicant for an initial or a renewal license to comply with all state substantive and procedural requirements relating to the use of water by the proposed project. While it would preserve exclusive licensing authority in FERC, the states would determine whether the applicant could use any water for the proposed project and, if so, on what conditions. Thus, if there were water physically available to meet the project's requirements that had not already been committed to existing users, a state could nevertheless deny a water right to the applicant if it felt the water should be reserved for other future unspecified uses. Similarly, it could grant a water use permit on conditions so burdensome as to make the project economically infeasible, as California had proposed in the *Rock Creek* case. Beyond that, S. 106 would authorize a state to impose new or changed water use conditions on all *existing* licensees, of

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[10] The same concept of a license conferring a right to appropriate previously uncommitted water is also reflected in *Pacific Gas & Elec. Co.* v. *FERC*, 720 F.2d 78 (D.C. Cir. 1983), where the court stated that "it is plain that when FERC grants a license without appropriate reservation, FERC *does* undertake not to license other projects that will substantially alter the supply of water to the prior licensee without its consent." *Id.* at 87, n. 19 (emphasis in original).

which there are currently about 1000, which again could be so burdensome as to render many of them infeasible. This proposal would eviscerate the exclusive licensing authority which Congress wisely vested in the Commission. That exclusive authority obviously must extend not only to the licensing of such projects but to the use of water in their subsequent operation. The authority to impose appropriate operating and related conditions in a license is at the heart of the Act's regulatory scheme and must rest exclusively with the Commission if it is to be exercised effectively.

NHA knows of no existing legislation by which Congress has given the states the authority to veto the development of federal land or water resources.[11] It would be particularly inappropriate to do so now at a time when many are urging a greater role for renewable energy resources, such as hydropower, as part of a national energy strategy.

In my opinion, the last sentence of section 2 of S. 106 would also overturn the Supreme Court's decision in *FPC* v. *Oregon*, 349 U.S. 435 (1955), the famous *Pelton Dam* case, which established the rationale for federal reserved water rights. Under that doctrine, the reservation by Congress or the Executive Branch of unappropriated public lands for a specified purpose impliedly reserves enough unappropriated water on those lands to satisfy the minimum reasonable requirements of the principal purpose of the reservation. In the *Pelton Dam* case the Supreme Court held that state water laws, regardless of the extent to which they otherwise may have been preserved under section 27 in non-public land states, have no applicability to a project when the basis for Commission jurisdiction rests in whole or part on the proposed location of the project on federal lands which have been "withdrawn" from disposition under the public land laws and "reserved" for power development purposes.

Under section 24 of the Act "any lands of the United States included in any proposed project . . . *shall* from the date of filing of application therefore be *reserved* from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." 16 U.S.C. § 818 (emphasis added)). The Supreme Court's decisions suggest that such a reservation impliedly reserves enough unappropriated water to meet the minimum reasonable requirements of the primary purposes of the reservation, *i.e.*, hydropower production. *United States* v. *New Mexico*, 438 U.S. 696 (1978); *Cappaert* v. *United States*, 426 U.S. 128 (1976). Moreover, any license issued in such circumstances arguably also impliedly carries with it the authorization to utilize the federal reserved water for the operation of the licensed project.[12] Whatever one's views may be about the federal reserved water rights doctrine, the implications of negating the water rights consequences of the power site withdrawal provisions of the Federal Power Act should be carefully considered. To date they have not even been mentioned by the proponents of S. 106.

Finally, the proponents of S. 106 have not explained how the individual states could deal with the substantial problems associated with hydropower development in a interstate river basin. The only apparent approach would be by interstate compact. At present there are about 21 interstate water compacts, but except for the unique federal-interstate compacts on the Delaware and Susquehanna Rivers, which are relatively recent (1961 and 1970, respectively), no other compacts have created interstate agencies with adequate powers to deal with the comprehensive development of an interstate river basin's hydropower and related water resources. While it is conceivable that basin states could abandon their traditional views of the sanctity of state sovereignty and forge interstate institutional mechanisms that might be able to assume some of the responsibilities now shouldered by FERC, those possibilities seem extremely remote. This assessment is reinforced by the fact that there are presently three interstate water disputes pending before the Supreme Court involv-

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[11] NHA is aware of only two situations in which Congress has subordinated the comprehensive hydropower planning and licensing authority of the Commission to the states, and then it did so expressly and also reserved an "escape valve" for the Commission. In the Delaware and Susquehanna River basins, where the basin states established by federal-interstate compact interstate agencies with broad planning and regulatory powers in 1961 and 1970, respectively, Congress provided that the Commission's licensing decisions "shall not substantially conflict" with the comprehensive plans of such agencies unless the President finds that the "national interest so requires." See Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 Nat. Res. Law. 153, 160-63 (1973).

[12] *Compare Skeem* v. *United States*, 273 Fed. 93 (9th Cir. 1921); Report of Special Master Simon H. Rifkind, p. 266 (December 5, 1960) adopted in *Arizona* v. *California*, 373 U.S. 546 (1963) (agricultural lessees of Indian lands entitled to a federally reserved water right may utilize such reserved right).

ing western rivers—the South Platte, Arkansas and Canadian—and another is brewing in the southeast on the Chattahoochee and Coosa rivers. Thus, by stripping FERC of its exclusive, comprehensive water allocation authority for hydropower development, Congress would essentially return the hydropower industry to where it was at the turn of the century. That institutional situation was not adequate then and would surely be inadequate now.

E. CONCLUSIONS AND RECOMMENDATIONS

The *Rock Creek* decision was based largely on the hydropower industry's reliance on *First Iowa* for 44 years and Congressional rejection of efforts by the states to overturn it in the Electric Consumers Protection Act of 1986 ("ECPA"). Instead ECPA amended the Federal Power Act in several significant ways to enhance the roles of the States in the licensing process. First, it amended section 10(a) to require the Commission to consider state comprehensive river basin plans in making its licensing decisions. 16 U.S.C. § 803(a)(2)(A). Second, with respect to license conditions designed to protect fish and wildlife, it directed the Commission to include state and federal recommendations in a license unless it made an express finding that such a condition would be inconsistent with the basic purposes of the Act or other law. *Id.* at 803(j). It is clear that Congress has gone as far as it can to preserve and recognize state water law and policies under the Act without giving the states a veto over proposed or existing hydropower projects through the use of their water allocation authority. The proposal to do so in S. 106 is neither justified nor in the national interest.

The proponents of S. 106 have taken a very simplistic approach to the complicated and challenging problem of accommodating legitimate state and federal interests in the development of the Nation's hydropower resources. The ultimate objective of that program, of course, should be to develop those resources in the public interest. In addition to the important national interests to be served in such a program, due regard by Congress for the principles of federalism nevertheless requires serious consideration of the views of affected states as to the allocation of water resources to hydropower development. NHA believes that Congress has struck an appropriate balance in the Federal Power Act. If there are specific problem areas where the states feel that FERC has overstepped the limits of its jurisdiction, they obviously should be addressed. So far no such areas have been identified. If and when they are, NHA stands ready to enter into discussions about how to deal with them.

Senator BRADLEY. Thank you very much, Mr. Muys.

Senator Craig.

Senator CRAIG. Mr. Chairman, being cognizant of time, I will be brief. There are a variety of questions I would like to ask and again I will submit those for the record and, to you gentlemen, would appreciate your written response.

Mr. Haywood, Pacific Gas and Electric probably obtains its power from a variety of sources. I will show my ignorance by asking the question: Do you own and operate hydro facilities?

Mr. HAYWOOD. Yes, we do, Senator: 29 licenses with 75 power plants and about 150 dams. So we are well into the hydroelectric business.

Senator CRAIG. None of them with State water rights?

Mr. HAYWOOD. Every one of them with State water rights. We always get a State water right before, as well as an FERC license. We always have to go to the States for a State water right in every case.

Senator CRAIG. I see. Have you found in most instances where you have a State water right that it tends to facilitate your licensing process with FERC?

Mr. HAYWOOD. It facilitates to the extent that when we go to FERC for a license the agencies need to participate in that process, so that FERC can make a comprehensive review of the river system and act in the best interests of society, so in that respect.

And it is something we have done since the turn of the century, so it is just part of the process we go through.

Senator CRAIG. And now you are suggesting that should not be the case?

Mr. HAYWOOD. No, I am suggesting that the status quo should stay as it is, that we do go to the State for the water rights. FERC does not give us the water rights. They do not have jurisdiction over the water rights, only the use of the water in the case of a hydroelectric plant.

Senator CRAIG. But do you agree or do you not agree that FERC versus California in essence says that the State does not necessarily have to—in this instance that FERC does not have to abide by the presence of a water right?

Mr. HAYWOOD. No. Our interpretation, Senator, is that the result of the Supreme Court decision left it as the status quo which has always been, that we must have a State water right, which FERC always defers to, that we must go to the State for a State water right.

Senator CRAIG. I see. So you believe that the law prior to the court decision, or at least the status quo pre-court decision, is the same as after the court decision?

Mr. HAYWOOD. I do, yes, Senator.

Senator CRAIG. I find that interesting. Would all of you agree with that?

Mr. GARMAN. Yes.

Mr. MUYS. Well, the status is the same, but I disagree with what the status was before *Rock Creek*. I think *First Iowa* made it clear that you do not have to go to a State for a water use permit and *Rock Creek* affirmed that. I hate to disagree with my colleague on my left, but I think that is clearly what the Supreme Court held.

Senator CRAIG. I tend to agree with you. I think that is why we are here today.

Mr. HAYWOOD. Our practice is always go to the State to get a State water right. And the issue that we understand is being discussed is the use of that water through a hydro project.

Senator CRAIG. I see.

Mr. Garman, is it?

Mr. GARMAN. Yes.

Senator CRAIG. Thank you. We out West have an interesting blend of facilities—Corps, Rec projects. I think you referenced a project that partly was secured because of the flows that come out of Grand Coulee. Grand Coulee is a Rec project?

Mr. GARMAN. That is correct.

Senator CRAIG. Grand Coulee has a State water right.

Mr. GARMAN. I frankly have no idea whether they do or not.

Senator CRAIG. Under section 8 of the Reclamation Act, by law it requires it.

Mr. GARMAN. That may be, Senator. I do not personally know.

Senator CRAIG. Well, I think you can see my frustration, and I say that without any embarrassment that I have been a strong advocate of hydropower and the utilities out West all of my public life. And I also found that that relationship that existed historically, where utilities found it necessary to comply with State water

law as they pursued a Federal license, was also a compatible relationship.

I think that *Rock Creek* significantly changed that. I believe S. 106 begins to reestablish that. I can appreciate your frustration with two authorities versus one authority. You have always operated in my opinion, in the opinion of many, under two authorities, and I guess that is what we are working to craft here.

I have absolutely no feel that what I have crafted in the first instance is absolute and is unchangeable. But I do strongly believe in primacy as it relates to water rights and will work very hard to get that accomplished. And I think that it has served the western hydro States, of which we are all a part, very, very well historically.

But it is also to recognize that there are other uses for that water, and I think that is also important. So that is part of why this legislation has been introduced, and it is certainly not in any way to condemn hydro development. I have obviously been an advocate of it at times when it was less than popular to be and I remain so today.

But I try to find that we could strike a balance here and still not deny that in a lot of other issues besides just this one the right of the State to make those kinds of determinations remains extremely valuable.

Gentlemen, thank you all for your testimony.

Senator BRADLEY. Thank you very much, Senator Craig.

Mr. Muys, do you think the bill needs any change or could you recommend any change so as to lay to rest any question about its threat or lack thereof to Indian water rights, Federal reserved water rights, interstate compacts, or international water agreements?

Mr. MUYS. I do not think the bill as I read it poses any threat to any of those categories, except Federal reserved water rights. I read the act, which on the filing of a license application automatically reserves the Federal lands to be occupied by the project, under Supreme Court decisions in my view, impliedly reserves enough water for the purpose of the reservation, which is power development, although the Supreme Court has never addressed that yet. But it is consistent with the whole concept of Federal reserved water rights.

And the language in section 2, which says "Nothing in this act shall preclude the application of State law," would essentially overturn the *Pelton Dam* decision that Senator Hatfield mentioned, the 1955 decision that essentially established the Federal reserved water right doctrine.

Senator BRADLEY. So that——

Mr. MUYS. It may not be intended, but I think that is the effect of it.

But as far as Indian rights, compacts, and international obligations, I really do not see anything in the bill that goes to that.

Senator BRADLEY. Mr. Muys, what about the issue of FERC not being able to override in-stream water rights?

Mr. MUYS. I think all vested water rights are protected by section 27. Section 27 is somewhat awkwardly phrased, but when we did our brief in the Supreme Court for the hydropower industry we

gave our interpretation of what Congress was trying to do and what that section meant. I think it means that all vested water rights of any kind, even one granted to the Nature Conservancy for an in-stream flow right, is protected.

Senator BRADLEY. So do you believe that as a lawyer, that if California State law had recognized an in-stream water right for the Nature Conservancy, that *Rock Creek* would have come out differently?

Mr. MUYS. I think it might have. It would have presented an issue that has never been directly resolved. Unfortunately, the Supreme Court used—in *First Iowa* they referred to the kinds of rights protected in section 27 as "proprietary," and I think Congress really had in mind primarily consumptive use rights, for irrigation and municipal purposes.

But as far as the kind of rights protected by the clause that protects all vested water rights, it seems to me any valid water right under State law, or indeed Federal law, ought to be protected.

Senator BRADLEY. So that a State could create in-stream water rights that would have to be protected? That is one way to assure a certain amount of water for fish.

Mr. MUYS. In third parties, in your hypo, I would go along with it. I would be a little concerned about the tendency of some States to make an appropriation as a State, somehow appropriate all the unappropriated water and, under that guise of having a proprietary right in the water, do an end run on *Rock Creek*.

I do not think Congress intended that in the Federal Power Act. They intended to preserve proprietary rights in other entities that have been awarded by the State. But I think your hypo would pass muster as a protected, vested water right under the act as it stands.

Senator BRADLEY. Well, let me thank you very much for your testimony and I appreciate it. I personally have found it very informative. Thank you very much.

Senator CRAIG. Thank you, gentlemen.

Senator BRADLEY. Our last panel consists of: John Echeverria, Vice President, American Rivers; David Conrad, National Wildlife Federation.

Welcome, Mr. Echeverria. The floor is yours. The time is late. Your wisdom will be concise and the subcommittee will be appreciative.

STATEMENT OF JOHN D. ECHEVERRIA, VICE PRESIDENT AND CONSERVATION DIRECTOR, AMERICAN RIVERS, INC.

Mr. ECHEVERRIA. It will be. Thank you, Mr. Chairman.

I have submitted a written statement and I have a few brief remarks to summarize it.

First I want to express that American Rivers is sympathetic with many of the concerns that have been expressed by representatives of the western States regarding the Federal Energy Regulatory Commission. In particular, we share the concern that the Commission has extended the *Rock Creek* decision to arrogate to itself the authority to regulate uses seemingly from the headwaters to the mouth of the river.

Assuming the *Rock Creek* decision was correctly decided, it is doubtful that the Congress or the court thought that granting the Commission the power to decide minimum flows at an individual project gave the Commission the authority to regulate every other conceivable water use in a river basin that contained a project under the Commission's jurisdiction.

Having said that, we are concerned that S. 106 would go too far in the other direction by requiring that a hydropower applicant comply with all the procedural and substantive requirements of State law. In our view, the bill would simply shift too much authority to the States and interfere with the ability of the Federal Energy Regulatory Commission, in consultation with numerous Federal resource agencies, to protect the Federal interests that are at stake in hydropower proceedings.

Let me mention two ways in which I think the *Rock Creek* decision can be addressed, although in a different way than S. 106. First, we would recommend that the Federal Power Act be amended to prohibit the Commission from authorizing the construction of hydropower projects on rivers that States have determined should not be developed for that purpose. Senator Hatfield alluded earlier to the situation in the State of Oregon where the State has declared certain rivers in that State off-limits and yet they are threatened by imminent FERC action.

In your own State, Senator Craig, the State legislature has designated the North and South Forks of the Payette as free-flowing rivers, and yet there are hydropower projects that the Commission may license.

We think the protections the States have tried to establish for those rivers should be made ironclad.

Second, we urge the members of the committee to support S. 822, introduced by Senator Jeffords of Vermont. This bill would affirm that the States have broad authority under section 401 of the Clean Water Act to protect and achieve the designated water uses included in State water quality standards. We believe the Jeffords bill will go a long way toward restoring State authority undermined as a result of the *Rock Creek* decision and at the same time preserve the authority of the Commission and Federal resource agencies to establish minimum conditions for the protection and mitigation of damages to and enhancement of resources of concern to them.

Thank you.

[The prepared statement of Mr. Echeverria follows:]

PREPARED STATEMENT OF JOHN D. ECHEVERRIA, VICE PRESIDENT AND CONSERVATION DIRECTOR, AMERICAN RIVERS, INC.

Good afternoon. My name is John D. Echeverria. I am the Vice President and Conservation Director of American Rivers, Inc., the national conservation organization dedicated to the protection and restoration of our nation's outstanding rivers. I appreciate the opportunity to testify today on S. 106, a bill to amend the Federal Power Act to establish the primacy of state water law in the regulation of hydropower projects.

American Rivers has a longstanding interest in strengthening state authority to control the adverse effects of hydropower development. American Rivers filed a friend of the court brief in the *Rock Creek* case in the U.S. Supreme Court in basic support of the position of the State of California. Working closely with various states, we also led a successful effort to overturn the FERC's initial decision to

adopt an extremely narrow definition of state "comprehensive plans" that the FERC must consider under section 10(a)(2) of the Federal Power Act.

American Rivers shares the concern of the Western States about the aggressiveness and insensitivity with which the Commission has implemented the *Rock Creek* decision. The Commission has extended the *Rock Creek* decision to claim broad authority to regulate essentially all water uses upstream and downstream of a project. In the face of claims by ranchers, farmers, and other third parties that hydropower operations conflict with their water uses, the Commission has said it would resolve these disputes in the context of the Commission's hydropower proceeding, and imposed on these third parties, who have no connection with or interest in the hydropower project, the entire burden and expense of marshalling the evidence to protect their interests.

The Commission's approach to implementing the *Rock Creek* decision is consistent with the Commission's chronic unwillingness or inability to consider the burdensome effects of its procedures and policies on other agencies and members of the public. We suggest that the Committee would do well to consider the concerns expressed in this hearing in evaluating the wisdom of the proposals contained in S. 341 to concentrate regulatory authority over hydropower with the Commission.

While American Rivers is sympathetic with the Western States' frustrations with the Federal Energy Regulatory Commission, we are concerned that S. 106 would go too far by requiring that a hydropower applicant comply with all of the procedural and substantive requirements of state water law. In our view, the bill would shift too much authority to the States and interfere with the ability of the Federal Energy Regulatory Commission and other Federal agencies to protect the important Federal interests at stake in hydropower licensing decisions.

It bears emphasizing that one of the primary environmental effects of a hydropower project is alteration of the amounts and timing of water flow at and below the site of the project. In both hydropower licensing and relicensing cases, the determination of license terms and conditions relating to flow through and around a project significantly affects endangered species habitat, other fish and wildlife values, and recreational uses of the river. S. 106 would interfere with the ability of the Commission, in consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the National Park Service, for example, to protect, mitigate damages to, and enhance these values and uses.

American Rivers offers two alternative suggestions to strengthen State authority over hydropower development which, while they differ in approach to S. 106, are worthy of consideration by this Committee. First, we recommend that the Federal Power Act be amended to prohibit the Commission from authorizing the construction of hydropower projects on rivers that States have determined should not be developed for this purpose. For example, in March of this year, the Idaho legislature passed and the Governor signed a bill developed by the State Water Resources Board, after extensive public consultations, to prohibit hydropower development on designated reaches of the North and South Forks of the Payette River. This legislation is designed to protect the outstanding scenic, recreation, and fish and wildlife values and uses on these rivers. While the State of Idaho hopes that the Commission will respect the State's protective designation, there is no guarantee that the Commission will do so. The Federal Power Act should be amended to make the Commission's obligation to do so clear.

It is important to emphasize that this proposal would have only minuscule, if any, adverse effects on electricity supplies. According to information submitted by the Commission in connection with this Committee's most recent FERC oversight hearing, the Commission is not aware that it has ever authorized the construction of a hydropower project on a State designated river. Nonetheless, numerous projects have been proposed and actively pursued on state designated rivers in Idaho and other states over the last several years. Thus, it is worthwhile to make the protection for state rivers ironclad.

Secondly, we urge the members of the Committee to support S. 822, introduced by Senator Jeffords of Vermont, to reaffirm the broader view of State authority under section 401 of the Clean Water Act. Section 401 authorizes the States to review proposed hydropower projects and other Federally regulated projects affecting navigable waters to ensure that the projects do not adversely affect the achievement of State water quality objectives. Unfortunately, the courts are divided on whether this authority only allows the States to enforce water chemical parameters or grants the State's broad authority to protect and achieve the designated water uses included in State water quality standards. We believe the Jeffords bill will go a long way toward restoring State authority undermined as a result of the *Rock Creek* decision and at the same time preserve the authority of the Commission and Federal re-

source agencies to establish minimum conditions for the protection, mitigation of damages to, and enhancement of resources of concern to them.

Thank you for the opportunity to testify. I would be happy to answer any questions you may have.

Senator BRADLEY. Thank you very much, Mr. Echeverria.

Mr. Conrad.

STATEMENT OF DAVID R. CONRAD, WATER RESOURCES SPECIALIST, NATIONAL WILDLIFE FEDERATION

Mr. CONRAD. Thank you, Mr. Chairman. I appreciate the opportunity to present the views of the National Wildlife Federation on S. 106.

In general, we also have strongly supported the efforts of States to increase their level of involvement in hydropower licensing, including important changes in ECPA in 1986. However, we oppose S. 106 because we believe it would eliminate a critical floor of environmental protections that now exist in the Federal Power Act as amended by ECPA and in related Federal environmental laws.

It would make hydroelectric licensing and the protection of the environment much more difficult and unpredictable than it currently is, and it would vastly reduce, especially in western States, the opportunities for the public to be involved in developing the environmental conditions associated with hydropower developments.

S. 106 proposes to rely exclusively on State water laws to control water use, including in-stream flow decisions. We find such a proposal unacceptable. Too many States remain either poorly equipped or indisposed to provide for environmental protections and necessary in-stream flows in their water use decisions.

State water courts and agencies tend to view water as a traditional property issue. In many cases the laws are not designed to address the environmental concerns or to provide for significant public involvement and they are administered by State bureaucracies that have widely varying commitments to and authority to protect the environment.

It is also impractical and extremely expensive for the public to engage in each water case before water boards and the courts for necessary in-stream flows. In general, western State water laws allow only certain agencies to hold in-stream flow rights and not individuals. Minimum flow rights are often set to simply keep a fishery alive and not enough to maintain productive high quality fisheries. There are many other limitations as well.

We also believe the effectiveness of ECPA and other requirements of the Federal Power Act would be significantly weakened if the authority to prescribe in-stream flows were subject to State law only.

Mr. Chairman, I would also add that the Congress has provided in the Clean Water Act section 401, State water quality certification program, an authority that empowers States to assert their prerogatives for Federally licensed projects, including hydropower projects, as they relate to a State's water quality standards.

It is a tool that is critically important to the States, especially in the wake of the *Rock Creek* decision.

In order to further assist States, we would support legislative clarification in section 401 that assures that States can protect a

broad range of water quality standards, including biological standards and achievement of designated uses in the 401 process.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Conrad follows:]

PREPARED STATEMENT OF DAVID R. CONRAD, WATER RESOURCES SPECIALIST, NATIONAL WILDLIFE FEDERATION

My name is David R. Conrad. I am Water Resources Specialist for the National Wildlife Federation. I appreciate the opportunity to present the views of the Federation on S. 106, regarding the establishment of state primacy in the control of water resources in hydroelectric licensing under the Federal Power Act.

The National Wildlife Federation is the nation's largest conservation organization with 5.5 million members and supporters and 51 state and territorial affiliate organizations. Because of the profound and significant environmental impacts that are often associated with hydroelectric power development, the Federation has been an active participant in numerous FERC hydroelectric power licensing proceedings and rulemakings. The Federation was also actively involved in the development of the 1986 Electric Consumers Protection Act's (ECPA) amendments to the Federal Power Act, which made important improvements in environmental protections in hydroelectric licensing.

Mr. Chairman, in general, the Federation has strongly supported the efforts of the states to increase their level of involvement in hydroelectric power licensing. In particular, we supported the ECPA amendments to Section 10 of the Federal Power Act requiring FERC to determine a proposed project's level of consistency with state comprehensive plans and to require deference to state and Federal fish and wildlife agencies' recommendations for protection of fish and wildlife resources. We also urged Congress to reverse FERC's infamous Order 464, which retroactively waived state water quality certification for some 226 pending hydroelectric licenses. While we believe FERC has not treated states fairly in many instances, and further believe FERC is not yet meeting the intent of Congress in implementing ECPA, we strongly oppose the approach in S. 106 to reverse the tables and grant states complete primacy in controlling water used by hydropower projects.

Specifically, the Federation opposes S. 106 because:

- it would eliminate the critical floor of environmental protections that now exist in the Federal Power Act, as amended by ECPA, and in related federal environmental laws;
- it would make hydroelectric licensing and the protection of the environment much more difficult and unpredictable than it is currently;
- it would vastly reduce, especially in the Western states, the opportunities for the public to be involved in developing the environmental conditions associated with hydropower developments.

Granting state primacy over the Commission regarding water use as proposed in S. 106 would result in substantially lower levels of overall environmental protection than current law affords to the nation's river and stream resources.

Mr. Chairman, one of the paramount environmental issues regarding hydroelectric development has been the establishment of adequate instream flows below dams and water diversions. Projects can affect water flows in many ways, including the conversion of flowing water to slack water, the pulsing of river flows downstream for peaking power, storage, or water delivery, the diversion of large quantities of water out of streams for conveyance through canals or penstocks, and sometimes the complete dewatering of downstream river reaches for long distances. The projects in turn can have enormous impacts that:

- adversely affect fisheries and wildlife (eg. losses of many types of habitat, impacts on or blockage of spawning, migration, and reproduction, damage to endangered and threatened species, fish passage losses, including significant turbine mortality);
- degrade water quality (wide ranging impacts, including lowered dissolved oxygen and assimilative capacity, increases or decreases in temperature, increases in toxic chemicals, losses of wetlands, etc.)
- reduce recreation opportunities (including fishing, boating, rafting, kayaking, hiking, and a host of other uses) and aesthetic values, many of which are rare or unique to an area or region;
- increase erosion and sedimentation;
- damage cultural, historical, or archaeological values; and

- adversely affect many other existing or planned uses of waterways and watersheds, such as municipal, industrial, or agricultural water supplies, flood control, and navigation.

S. 106 proposes to rely exclusively on state water laws to control water use, including instream flow decisions. We find such a proposal entirely unacceptable. While some states may have a growing awareness of the need for greater care in planning and allocating water, particularly where environmental protection is concerned, far too many states remain either poorly equipped or indisposed to provide for environmental protections and necessary instream flows in their water use decisions. This is especially a concern in the Western states.

Conservation organizations in the West, as well as Indian tribes and Federal and state natural resource agencies have experienced enormous frustration in attempts to ensure adequate streamflows for fish and wildlife, water quality, recreation needs, and other environmental concerns through the state water laws.

Often the state water courts and agencies tend to view water as a traditional property issue. In many cases the laws are not designed to address the environmental concerns, or to provide public involvement, and they are administered by state bureaucracies that have limited authority and widely varying commitments to environmental protection. As an example, in a case the Federation is currently litigating in Colorado, a water court has refused to allow any evidence bearing on the public interest regarding a major inter-basin water transfer, including evidence regarding the environmental consequences of the water rights issues involved. It is also impractical and extremely expensive for the public to engage in each water case before water boards and the courts for necessary instream flows.

Generally, Western state water laws allow only certain agencies to hold instream flow rights, and not individuals. The minimum flow rights are often set to simply keep a fishery alive, and not enough to maintain a productive, high quality fishery. There are many other limitations as well. While Alaska, just as an example, has probably the strongest instream flow law among the Western states, and allows individuals to apply for and hold instream rights, it requires a review of the rights every ten years. They are subject to revocation if a finding is made that another use is in the best interests of the state. Another Western state's water law limits the delivery of water for instream flows from a reservoir only to maintain an existing fishery, but apparently not for its improvement. I have included as an attachment to this testimony, a brief summary of the status of instream flow laws in the 19 Western states and a number of their most obvious limitations as they relate to fish and wildlife protection, prepared by Christopher H. Meyer, a Federation attorney with extensive experience in Western water law. Once again, while some states have been attempting to update and improve their capabilities to establish instream flows, there are many circumstances where states would be unable to provide the minimum levels of environmental protection provided under the present Federal Power Act.

The establishment of state primacy would undercut the environmental improvements made in the Electric Consumers Protection Act.

In our view, because of the limited success of many state water laws in reaching a basic level of environmental protection, it is best to build upon the existing Federal Power Act and other related laws. The 1986 Electric Consumers Protection Act requires the Commission to "give equal consideration to" energy conservation, fish and wildlife, recreation, and preservation of other aspects of environmental quality. It requires the Commission to "adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). . . ." The Commission is also required under section 10 of the FPA to consider a comprehensive view of a waterway, which is not limited to a state's perspective, particularly for an interstate river. In many cases these are much stronger requirements than now exist under state water laws. We believe the effectiveness of ECPA and other requirements of the Federal Power Act would be significantly weakened if the authority to prescribe instream flows were subject to state law only, as proposed in S. 106.

The Clean Water Act affords states a critically important avenue for asserting state prerogatives in hydropower licensing.

Mr. Chairman, we are aware of the significant difficulties many states have faced in dealing with the Federal Energy Regulatory Commission. The Congress has provided, however, in the Clean Water Act's section 401 state water quality certification program an authority that empowers states to assert their prerogatives for all federally licensed or permitted projects (including hydropower projects), at least as they relate to a state's water quality standards. It is a tool that is critically important to states, especially in the wake of the Supreme Court's *Rock Creek* decision.

Under existing law, a Federal licensee or permittee must obtain a certification from the state where the project is located that the project will meet or exceed the state's water quality standards. The state may waive the certification requirement. The state may also set such conditions in the certification as are necessary to meet the state standards. The state standards must be at least as stringent as those required by the Clean Water Act. Denial of state certification precludes issuance of the federal permit or license.

Among other types of conditions under section 401, states may set instream flow conditions to meet the water quality standards. By establishing detailed state water quality criteria and designated uses that reflect the water quality goals and objectives for a state's streams, a state can have a significant role in the siting and conditioning of hydroelectric development within its jurisdiction. The EPA has provided strong encouragement to the states in this regard. I have included as an additional attachment to this testimony a letter from EPA's Assistant Administrator for Water to the FERC describing the agency's views on state 401 authority. While section 401 does not address all the concerns of states regarding water use controls, it is a significant authority that can be of major utility in state water resource planning and development.

In order to further assist the states, the Federation strongly supports a legislative clarification of Section 401 that assures that states can protect a broad range of water quality standards, including biological standards and the achievement of designated uses in the 401 certification process. Such clarifications are included in bills offered by Senator Graham and Representative Studds in the 102d Congress.

CONCLUSION

The granting of exclusive state primacy over water use in hydropower licensing would severely weaken the effectiveness of environmental protections under the Federal Power Act. We believe the Clean Water Act affords an avenue with considerable promise that gives states a significant role in the siting and conditioning of hydroelectric power projects. To that end, the Federation supports clarification of the Clean Water Act to assure that states can protect a broad range of water quality standards under Section 401.

Mr. Chairman, again I appreciate the opportunity to present the views of the Federation. I wood be happy to respond to any questions.

Appendix E

STATE-BY-STATE SURVEY OF INSTREAM FLOW LAWS IN THE NINETEEN WESTERN STATES

Summary

Of the nineteen western states the following sixteen have incorporated instream flow protection into their prior appropriation systems (as early as the year specified):

1. Alaska (1980)
2. Arizona (1941)
3. California (1985)
4. Colorado (1973)
5. Hawaii (1982)
6. Idaho (1974)
7. Kansas (1980)
8. Montana (1973)
9. Nebraska (1984)
10. Nevada (1988)
11. North Dakota (1977)
12. Oregon (1955)
13. Texas (1977)
14. Utah (1986)
15. Washington (1969)
16. Wyoming (1986)

Only three have yet to do so:

1. New Mexico
2. Oklahoma
3. South Dakota

Alaska

In 1980 Alaska adopted a water reservation statute which provides probably the most sweeping recognition of instream flow rights adopted by any western state. Alaska Stat. §§ 46.15.145, 46.15.260. Under this law any person, organization, or governmental entity may apply to the commissioner of natural resources to reserve sufficient water to maintain a specified instream flow for fish, wildlife, recreation, park, transportation, and other purposes. The only "catch" is that the commissioner must review the reservations once every ten years, and may revoke the instream flow reservation if he or she determines it is no longer in the best interests of the state.

Arizona

Arizona also appears to have recognized instream flow water rights. Arizona's water code was amended in 1941 and again in 1962 to recognize recreation, fish, and wildlife as beneficial uses of water. Ariz. Rev. Stat. §§ 45-141(A), 45-172, 45-157(B)(4), 45-180. Like Nevada, discussed below, the legislature neglected to say anything about the diversion requirement. A 1976 court decision, however, concluded that when the legislature recognized recreation, fish, and wildlife as beneficial uses, it implicitly did away with the diversion requirement thereby enabling water rights to be obtained for instream flows. McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (Ariz. Ct. App. 1976).

California

In reaction to two cases which restricted recognition of instream flow rights, California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (Ct. App. 1979); Fullerton v. State Water Resources Control Bd., 90 Call. App. 3d 590, 598, 153 Cal. Rptr. 518, 524 (Ct. App. 1979), the state legislature enacted an instream flow law in 1985 which authorizes the California Water Resources Board to condition newly issued consumptive water rights to protect instream flows. Cal. Water, §§ 1243, 1243.5; 1257.5.

The state has also adopted the California Wild and Scenic Rivers Act, Cal. Pub. Res. Code § 5093.50 to 5093.69. The Act, however, does not explicitly create any instream flow water rights.

Colorado

Colorado has had an instream flow law on the books since 1973. Under the state system, the Colorado Water Conservation Board may obtain and hold water rights for instream flows for fish and wildlife purposes. The program has proven an important first step, but the state has a long way to go. While the CWCB now holds instream flow rights on 1,074 segments of streams totaling 6,700 miles, most of the rights are for a trickle of water--typically a couple of cubic feet per second. (One cfs is roughly equal to the flow of thirty garden hoses.) This is enough to sustain cold water fisheries, but far short of the cascading mountain streams we associate with the natural environment.

In the early years of the program, several instream flow water rights were granted to private organizations. This approach was rejected in 1987, however, when the state legislature enacted an amendment, known as S.B. 212, which prohibits private parties from obtaining instream flow water rights. Now, unless pending challenges to the statute prevail, if a private organization wishes to purchase a consumptive water right and convert it to instream flow use, the only way it can do this is to donate the water right to the Colorado Water Conservation Board.

Hawaii

Hawaii adopted its Instream Use Protection Act in 1982 which authorizes the Board of Land and Natural Resources to establish instream flow standards for the windward Oahu districts. In May 1987, the Hawaii legislature enacted a new water code which expanded the geographic scope of the instream flow program to the entire state and shifted responsibility for the program from the Board of Land and Natural Resources to the Commission on Water Resource Management. The statute also established a schedule for the establishment of standards.

Idaho

Instream flow water rights were first recognized in Idaho by the court. State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974). The case arose when the legislature specifically authorized the Department to "appropriate" water in Malad Canyon for recreational purposes. The court held that Idaho's constitution did not require an actual physical diversion, and that the legislature must have intended to do away with the diversion requirement.

In 1978 the legislature first recognized instream flow water rights. Idaho Code §§ 42-1501 to 42-1505. The provision defined instream flows for recreation and other uses as beneficial, and explicitly did away with the diversion requirement. Only the Idaho Water Resource Board may apply for an instream flow right, but any person, association or government agency may request the Board to act. Approved applications are subject to legislative veto.

Kansas

Kansas has an instream flow law which charges the state engineer with withholding appropriations of water so as to provide minimum stream flows whenever the legislature approves any state water plan which identifies a minimum desirable streamflow for any watercourse in the state. Kan. Stat. Ann. § 82a-703a. To date the legislature has established instream flows on nine rivers.

Montana

The legislature recently enacted an instream flow law, Mont. Code Ann. §§ 85-2-102(a), 85-2-316, which allows the Montana Water Board to "reserve" waters for instream flow purposes. The law limits the amount which may be reserved, however, to fifty percent of the average annual flow of record on gauged streams. Mont. Code Ann. § 85-2-316(6).

Nebraska

Nebraska's instream flow law, Neb. Rev. Stat. §§ 46-2,107 to -2,119, was enacted in 1984. It provides for instream appropriations to be obtained by the Nebraska Game and Parks Commission or various Natural Resource Districts for that amount of water necessary for recreation or fish and wildlife.

Nevada

In December 1988, the Nevada Supreme Court ruled unanimously that instream flow water rights are protected under Nevada state law. State v. Morros, slip op., No. 18105 (Nev., Dec. 21, 1988). The case involved an application for a water right by the BLM to protect a trout fishery at Blue Lake in northwestern Nevada. Curiously, when the State Engineer granted the water right, the state Attorney General (which is required by law to represent the State Engineer) instead sued the State Engineer. NWF and the Sierra Club intervened on behalf of the BLM and the State Engineer. Ultimately the Nevada Supreme Court sided with the proponents of instream flow, relying in part on a 1969 statute which declared recreation to be a beneficial use of water. While the court opinion did not squarely address the issue, its reasoning would support recognition of instream flow water rights by private parties as well.

New Mexico

New Mexico remains one of only three western states apparently without any legal protection for instream flow rights. However, conservationists are working hard to change that. A proposed instream flow bill, H.B. 64, was narrowly defeated in 1987. Another try is underway in the 1989 session. Interestingly, one writer has argued that instream flow water rights may be recognized under existing state law. Comment, Appropriation by the State of Minimum Flows in New Mexico Streams, 15 Nat. Resources J. 809 (1975).

North Dakota

North Dakota provides limited recognition to instream flow rights by way of authorizing the state engineer to deny water rights on the ground of their "effect on fish and game resources and public recreational opportunities". N.D. Cent. Code § 61-04-06(4)(b).

Oklahoma

Oklahoma provides no explicit recognition of instream flow water rights. The state has, however, enacted a state Scenic Rivers Act which "preserves" designated river segments. The Act does not state whether or not it implicitly reserves water for instream flows.

Oregon

Oregon first enacted a reservation program for the protection of instream flows in 1955. A new instream flow law became effective October 1, 1987 which recognizes instream flow rights as true appropriations, and allows the transfer of consumptive rights to instream rights.

South Dakota

South Dakota provides no explicit recognition of instream flow water rights, although beneficial use is defined as "any use . . . [which] is consistent with the interests of the public of this state in the best utilization of water supplies" S.D. Codified Laws Ann. § 46-1-6(6).

Texas

The Texas legislature has declared that water may be appropriated for "recreation and pleasure" and "public parks and game preserves" Tex. Water Code Ann. § 11.023. While no case has yet addressed the question, the statute appears to give recognition to instream flow rights.

The Texas Water Commission also is authorized to consider "existing instream uses and water quality" in its consideration of new water permits. Tex. Water Code Ann. § 11.147(d). And special protection is afforded flows which may impair the quality of the state's bays and estuaries. Tex. Water Code Ann. § 11.147(a)-(c).

Utah

Since 1971 the Utah State Engineer has been authorized to deny an application for water rights where the proposed project "will unreasonably affect public recreation or the natural stream environment". Utah Code Ann. § 73-3-8.

In 1986 the legislature enacted Utah's first true instream flow law. Utah Code Ann. § 73-3-3(7). The law allows the state Division of Wildlife to file for instream flow water rights where necessary to protect fisheries. The law is limited, however, to the recognition of instream flow water rights which are transferred from other consumptive uses, and does not recognize the appropriation of unappropriated water for instream use.

Washington

The Washington Legislature has recognized "fish, shellfish, game and other aquatic life, . . . [and] recreation" as beneficial uses of water. Wash. Rev. Code Ann. § 90.14.031.

It has also established an elaborate system for the establishment of minimum flows. Wash. Rev. Code Ann. §§ 90.03.247, 90.22.010 to .040. This law allows the Department of Water Resources to "establish minimum water flows" for "protecting fish, game, birds or other wildlife resources or recreational or aesthetic values". Wash. Rev. Code. Ann. § 90.22.010. These designated minimum instream flows are treated as appropriations of water, Wash. Rev. Code Ann. § 90.03.345, and all permits issued to consumptive water uses shall be conditioned on maintenance of such flows, Wash. Rev. Code. Ann. § 90.03.247. Even where no instream flow has been specified, the Department of Ecology has the authority to deny new water rights where the Director of Fisheries determines that the new right might unreasonably reduce instream flows in the stream. Wash Rev. Code Ann. § 75.20.050.

In 1977 the state enacted an the Scenic River System Act, Wash. Rev. Code § 79.72.010 to .900. The Act, however, does not explicitly create any instream flow water rights.

Wyoming

Rebuffed year after year in the legislature, the Wyoming Wildlife Federation mounted a successful petition drive to place an initiative on the ballot which would recognize instream flows under state water law for the first time. As a result, the Wyoming legislature enacted its own law in 1986 providing limited recognition of instream flows. Wyo. Stat. §§ 41-3-1001 to -1014.

The law authorizes the state (through the Water Development Commission, upon recommendation of the State Game and Fish Commission) to appropriate the minimum amount of water necessary to support fisheries. Appropriations of direct flow may be made only upon a finding that storage of water for instream flow is infeasible. And a "call" on the river may be made only upon a showing of actual harm to the fishery.

From: WESTERN WATER AND WILDLIFE: THE NEW FRONTIER -- Christopher H. Meyer
March 1989

Attachment 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 1991

OFFICE OF WATER

Honorable Lois D. Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, NE
Washington, D.C. 20426

Dear Ms. Cashell:

I am writing on behalf of the Environmental Protection Agency's (EPA) Office of Water to help clarify issues regarding the application of Clean Water Act Section 401 state water quality certification to Federal Energy Regulatory Commission (FERC) licenses. This letter was precipitated by FERC documents addressing Section 401 certification: a letter of July 25, 1990, to James Elder, Director, Office of Water Enforcement and Permits, from Fred Springer of your staff; and portions of a June 5, 1990, Report of the Staff of the Federal Energy Regulatory Commission to the Water and Power Subcommittee of the U.S. Senate Energy and Natural Resources Committee.

The FERC report (page 4) asserts that state Section 401 certification conditions on FERC licenses related to "fish, wildlife, vegetation and recreation" are inappropriate. However, protection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes. A State may need to address any one or combination of these factors in particular circumstances in order to meet the mandates of the Clean Water Act (CWA) articulated in Section 101(a) "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."

State water quality standards form the backbone for formulating Section 401 decisions. EPA regulations (40 CFR Part 131) implementing Section 303(c)(2)(A) of the CWA require that States adopt water quality standards having three basic components: use designations, criteria to protect those uses, and an antidegradation policy. EPA regulations direct that, where attainable, States must designate uses to meet the CWA goal in Section 101(a)(2) of water quality which "provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in

and on the water." States must develop criteria designed to protect and maintain these designated water uses. States are not limited to adopting chemical-specific criteria, but are exhorted to adopt narrative and numerical criteria (40 CFR 131.11(b)). In addition, EPA's Fiscal Year 1991 Operating Guidance provides that by September 30, 1993, all States are to adopt biological criteria into their water quality standards. EPA regulations also require that States adopt antidegradation policies providing for protection of existing uses and the level of water quality necessary to maintain those uses. In the case of fill activities in wetlands, existing use requirements are met if the activity does not cause or contribute to significant degradation of the aquatic environment as defined in the guidelines developed under Section 404(b)(1) of the CWA.

In its letter, FERC expressed concern that States may be imposing conditions in hydropower licenses which go beyond EPA water quality standard requirements. As we explained above, water quality standards go well beyond chemical-specific criteria. In addition, Section 510(1) of the CWA expressly reserves the right of States to adopt or enforce "(A) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" that are equal to or more stringent than Federal standards or limitations. If a State imposes conditions or denies certification beyond the bounds of its authority, such conditions or denials may be challenged through the State administrative and judicial system.[1]

The FERC letter inquires about EPA's authority to limit State Section 401 decisions. As noted earlier, States have the authority to impose more stringent environmental standards. In addition, EPA's authority under Section 401 is limited. While EPA approves State water quality standards and, if necessary, promulgates Federal water quality standards, we do not have the authority to countermand State Section 401 certification decisions. The only exception is that EPA regulations (40 CFR Section 124.55(c)) provide for EPA to disregard State certification conditions or

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[1] We acknowledge some divergence in State Court decisions interpreting Section 401 certification authority. Compare In re Lava Diversion Project, 717 P. 2d 1274 (Ore. App. 1986) (allowing consideration of State land use planning in the State's 401 certification conditions) with Fourth Branch Associates v. Department of Environmental Conservation, 550 N.Y.S. 2d 769 (Albany Co., 1989) (limiting State certification decision to whether project will violate water quality standards). These decisions, however, were reached without any consideration of the views of EPA, the primary Federal agency responsible for implementation of the CWA. In any case, Section 401(d) of the CWA gives the States authority to place any conditions on water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, standards of performance, or pretreatment standards (Sections 301, 302, 303, 306, and 307 of the CWA) and with "any other appropriate requirements of State law."

certification denials when the grounds for the decision is that State law allows a less stringent permit condition. Under Section 401(a)(1), EPA has authority to conduct Section 401 certification decisions in cases where the State does not have the authority. For example, EPA issues certifications for South Dakota and for some Indian Tribes. In addition, Section 401(a) gives EPA specific responsibilities for notification and recommendations in cases where a discharge may affect the waters of any State other than the State in which the discharge originates.

EPA has issued, and will continue to issue, guidance and technical assistance for States to use in developing water quality standards and in implementing their Section 401 programs. Guidance on implementing water quality standards is included in EPA's Water Quality Standards Handbook. Recently, EPA issued program guidance on biological criteria (April 1990), and guidance on water quality standards for wetlands (July 1990). In addition, EPA is developing sediment criteria guidance and biological effects-based testing procedures for contaminated sediments, revisions to the water quality standards regulation, and other guidance as needed. In April 1989, we issued a handbook for States on the application of Section 401 certification to wetlands. Finally, as the principal agency responsible for administering the CWA, EPA routinely communicates its interpretation of statutory provisions such as those under Section 401 to State and Federal agencies.

I hope that this letter has clarified EPA's position on the broad range of elements that States need to include in their water quality standards to protect the quality of the nation's waters, the application of these and other considerations in Section 401 certification, and EPA's role in the certification process. If you have any questions regarding this letter or wish to meet to discuss water quality issues as they relate to your agency, please call me or have your staff contact Martha Prothro, Director, Office of Water Regulations and Standards (382-5400).

Sincerely yours,

LaJuana S. Wilcher

LaJuana S. Wilcher
Assistant Administrator

Senator BRADLEY. Thank you very much, Mr. Conrad.

Senator Craig.

Senator CRAIG. Mr. Chairman, I will be very brief. Again, I have other questions I would like to submit to these gentlemen, and I thank both of you for testifying.

I guess your testimony frustrates me more than it enlightens me, to be blunt about it. In fact, John, I find it interesting that you would choose to use the Clean Water Act to adjust, change, or otherwise regulate an entity that was created by the Federal Power Act, i.e., FERC. You want to adjust this problem in section 401. We want to address a specific problem as it relates to FERC and FERC is a monster or an entity of the Federal Power Act.

Mr. ECHEVERRIA. I guess I do not see the contradiction you do, Senator. Section 401 authorizes the States to attach terms and conditions to Federally authorized projects that affect navigable waters. Reaffirming the broad view of 401 would ensure that the States have broad powers to attach conditions to the licenses issued by the Commission to protect their interests in in-stream flows and designated uses in waterways.

Senator CRAIG. I.e., Payette. You mentioned Payette and what the State of Idaho would like to do versus what FERC has decided to do. I would like to have the State have the right to say: Okay, FERC, you can do that, but in this instance no water right, therefore no effective license.

Mr. ECHEVERRIA. Well, the Water Quality Act is a narrower provision. That was one of the several alternatives I threw out. The Clean Water Act deals with the water quality impacts, broadly speaking, of hydropower projects. There may be other reasons beyond water quality that would justify rejecting a project.

In the case of *Payette,* one of the particular values at issue is the scenic value of that area in its undeveloped state. That is not a value that in my view would be protected under the Clean Water Act.

Senator CRAIG. Counsel helps me out by saying, and I think very accurately, that when the State has made the decision that it has on *Payette,* for whatever reason, it will not grant a water right for the purpose that FERC decided, whether it is water quality or scenic value, whatsoever.

Mr. ECHEVERRIA. There are a number of instances in which the exercise of State power under the bill you propose would achieve a result we would support. Indeed, American Rivers filed a brief in the U.S. Supreme Court in the *Rock Creek* case in support of the result sought by the State of California.

Our concern is not so much in the application of the broadened authority you seek in the *Payette* case, but its application in other instances, in other States with respect to other projects.

Senator CRAIG. Well, time is limiting us. I guess also, Mr. Conrad, I would have extended to you the same line of questioning. I find it interesting. You testify on S. 106 by saying that S. 106 would eliminate the critical floor of environmental protection that now exists in the Federal Power Act as amended by the Endangered Species Act, I believe, and others as it relates to Federal environmental laws.

I guess, can you show me where the legislation, where this legislation, NEPA, and the Endangered Species Act or any other Federal environmental law is effectively amended by what I am doing or what I have proposed to do?

Mr. CONRAD. It has to do with what the capability of the Commission would be were this enacted regarding setting of in-stream flows. Essentially what this says is the States have laws with regard to in-stream flows. Some States do not even recognize an in-stream flow as a beneficial use. We have at least three States that I identified in my testimony that do not even recognize in-stream flows as a beneficial use.

So if we cede back to the States authority on water use, then the Commission will be unable to establish an in-stream flow in its conditions. The State fish and wildlife agencies, the Federal agencies, will not be able to establish the necessary conditions to protect the environment.

So that is how we read the law, that this provides a basic floor, the ECPA law provided a basic floor for protection of the environment.

Senator CRAIG. Mr. Chairman, thank you.

Mr. Conrad, you and I just disagree very clearly on this, because this does not take away from FERC any authority that it already has in the sense of issuing a license and all the conditions of a license. The kinds of things that you are addressing are potentially conditions of a license. They can always issue greater conditions than a State in these instances.

That has been the authority historically. And what I hear from you in essence is that we are taking away the right of FERC to grant a license and returning that license over to the State.

We are asking only in this instance that the State have the right to issue a water right for that purpose only. That does not accept or deny the processes of the licensure.

Mr. CONRAD. I am just providing our reading of this language.

Senator CRAIG. Thank you.

Thank you, Mr. Chairman.

Senator BRADLEY. Thank you very much, Senator Craig.

Let me thank both of you for coming to share your views today. We thank all the panelists. I think that from my perspective this has been a good airing of quite a number of issues. It has raised a number of important questions, and that is what the hearing process should do.

Senator CRAIG. Mr. Chairman, let me personally thank you for the time you have taken and the interest you have shown in this issue. I appreciate it.

Senator BRADLEY. Thank you very much, Senator Craig.

The subcommittee is adjourned.

[Whereupon, at 4:48 p.m., the hearing was adjourned.]

APPENDIX

Additional Material Submitted for the Record

Prepared Statement of the American Public Power Association

The American Public Power Association submits this statement in opposition to S. 106, a bill amending the Federal Power Act to enable the individual states to mandate conditions governing the operation of federally licensed hydroelectric projects.

APPA is the national service organization representing more than 1,750 locally controlled public power systems located throughout the United States. APPA has considerable interest in this legislation because public power systems hold federal licenses for 257 operating projects and 12 that are under construction. The combined capacity of all public power hydro projects is more than 18,000 megawatts out of a national capacity figure from all FERC-licensed hydro projects of approximately 47,000 megawatts.

APPA opposes the enactment of S. 106 because it would disrupt the licensing and relicensing process and jeopardize power production capacity at existing federally licensed projects. In addition, conditions set by states at federally licensed projects might jeopardize the power production capacity of upstream or downstream federal projects.

In 1920, the Congress, exercising authority granted it under the U.S. Constitution, enacted the Federal Water Power Act. That Act created the Federal Power Commission and empowered it to issue licenses for the development of projects "along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States. . . ." (Federal Water Power Act of 1920, section 4(e), 16 U.S.C.967(e)). In licensing projects, the Commission was directed to see that the development plans were "best adapted to a comprehensive plan for improving or developing a waterway. . . ." (16 U.S.C.803(b)).

Conflicts between the authority of the individual states and the Federal Power Commission in the licensing of hydroelectric projects were inevitable. The extent of the Commission's authority vis-a-vis the authority of the states in establishing conditions for hydroelectric projects was resolved in favor of the Commission by the U.S. Supreme Court in 1946 in *First Iowa Hydroelectric Co-op.* v. *FPC* (1946). The supremacy of the Federal Energy Regulatory Commission (the successor agency to FPC) was reaffirmed by the U.S. Supreme Court in *California* v. *FERC* (1990) (also know as the *Rock Creek* case). The Court expressly held that FERC has the exclusive authority to determine minimum downstream flows and other in-stream water conditions under the licenses it issues for hydroelectric projects on interstate and navigable waterways.

S. 106 has been characterized by some as an effort to reaffirm state authority to impose conditions on federally licensed hydroelectric projects—authority allegedly stripped away by the Supreme Court in *Rock Creek*. In fact, the issue presented by S. 106 is whether state authority to establish conditions should be expanded at the expense of federal authority so a state can establish the construction and operating conditions for a hydroelectric project that uses water within the state.

The issue raised by S. 106 has nothing to do with a state's authority over consumptive uses of water within its borders. That authority continues to be protected under Section 27 of the Federal Power Act (16 U.S.C. 821). That traditional state authority is not at risk. This should be obvious in view of the fact that the *Rock Creek* decision reaffirmed a precedent established in 1946. *Rock Creek* changed nothing. S. 106, in contrast, would be extremely disruptive, would undermine the centralized planning purpose of the Federal Power Act, and would prevent FERC from balancing all public interest factors in licensing hydroelectric projects.

Sound public policy and energy policy considerations clearly argue against the passage of S. 106.

By definition, the projects in question are those located on navigable waters. Many of these projects, and certainly those with substantial power production capacity, are located on rivers that cross (or comprise) state borders or are on tributaries that flow into such rivers. If S. 106 were enacted, states would pursue narrow, parochial interests in the conditions they mandate on federal licensees. States are not required to consider (and in fact probably lack the legal authority to consider) the effects of their decisions beyond their own borders. Without federal preemptive authority, individual states could hold neighboring or downstream states "hostage." Decisions of upstream states on such activities as water uses and water releases could harm downstream states.

True, some states are members of interstate compacts and have agreed to abide by the compact's water rules and regulations. However, it is not unusual for states within a compact to sue each other over water disagreements. Furthermore, not all states are members of a compact.

Not only are states ill-equipped to resolve competing demands among themselves, they also are ill-equipped to resolve competing demands for water within their own borders. State water agencies generally are not charged with balancing demands for water—whether those demands are for municipal water supply, fish and wildlife, irrigation, power production, recreation, or other uses.

FERC, on the other hand, is required to balance all such competing uses. This responsibility to ensure comprehensive development—a term used to encompass consideration of all uses of the nation's water resources—was enhanced by Congress when it enacted the Electric Consumers Protection Act of 1986. A comparison of Section 10(a) before and after the 1986 amendments clearly demonstrates this point. Prior to 1986, Section 10(a) required only that the licensing plan approved by FERC be "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. . . ." The 1986 amendments modified this to require that the project adopted for licensing be "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes. . . ."

Congress also went to great lengths in the 1986 amendments to ensure that the views of the states were considered and their interests fully protected. Section 10(a) was further modified to require the FERC to consider the extent to which a proposed project was "consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project" prepared by the state in which the project is located. Further, FERC must consider "the recommendations of . . . State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the state in which the project is located. . . ."

The ability of the states to affect the conditioning process for hydro licenses was also enhanced by Congress in 1986 through the addition of section 10(j). Under the requirements of that new section, FERC must include conditions recommended by states (or federal agencies) or explain why the recommended conditions are found to be inconsistent with the purposes of the Federal Power Act and why alternative conditions selected by the Commission are consistent with the law.

From these changes, it is clear that FERC has been explicitly directed to expand the scope of issues it considers when evaluating license proposals and that the states today enjoy considerably greater authority and ability to affect the licensing process than they did before the 1986 amendments. However, the ultimate responsibility and authority continues to reside, as it must, in the hands of a single federal agency.

The effect on the production of energy from our nation's rivers could also be undermined by the passage of S. 106. Federally licensed projects produce approximately 169 million megawatthours of electricity annually. Allowing states unilaterally, and perhaps with no consideration of the energy consequences of their actions, to alter project operations could threaten this important domestic renewable energy resource. If the power production capability of these projects is diminished, the shortfall thus created would have to be recovered from other energy sources. Such replacement power would not only be more costly for consumers, but would almost certainly have more significant environmental consequences than those associated with clean, renewable hydropower.

Further, this threat would exist over the entire term of the license. S. 106 would permit a state agency to prescribe new terms or conditions (such as new minimum flows) at any time during the term of the license. An electric utility licensee could never be certain that it could depend on its hydroelectric resources to meet future energy requirements since the state could render an operating project infeasible overnight. The existence of this uncertainty would also affect project finance. It would make financing new projects difficult and could also make it difficult for project licensees to finance improvements and modifications of existing projects at relicensing.

The federal government's historic and exclusive authority to control the operating conditions on hydro project licenses on interstate and navigable waterways provides stability that is critical to promote the maximum beneficial uses of its rivers, ensures the certainty of project operations, and balances the various competing interests for water. There must be only one authority—in fact, there can be only one authority—with the exclusive power to make the final decisions on license requirements. Logic holds that this authority must be lodged at the federal level.

Thirty years ago, APPA's general counsel, well-known water and power lawyer Northcutt Ely, testified before the Senate Committee on Interior and Insular Affairs, on essentially the same issue presented today. He said:

> Hydropower originating in a single State flows across State lines in instant response to the needs of users in other States. There is a national, not a parochial, interest in weighing power benefits from the non consumptive use of the stream against competing non consumptive uses such as fish runs which may be impeded by the dam. One agency must make this difficult evaluation, and the FPC, not several competing State agencies, is the logical one to determine the project best adapted to the comprehensive development of the stream.

His comments are as pertinent today as they were three decades ago.

PREPARED STATEMENT OF THE TEXAS WATER CONSERVATION ASSOCIATION

The Texas Water Conservation Association (TWCA) is a voluntary association of individuals, water districts, river authorities, associations, industries and municipalities. It was organized in 1944 to promote and support the development, conservation, protection and utilization of the water resources of Texas for all beneficial purposes.

This testimony is submitted on behalf of TWCA in support of S. 106 which amends the Federal Power Act to make clear that the authority of the Federal Energy Regulatory Commission to license hydropower projects is subject to the applicant's compliance with all procedural and substantive requirements of the State in which the project is located with regard to water rights and administration of the use of water.

Among the policy statements of the Texas Water Conservation Association is the following relative to State sovereignty in these matters: "We urge that the primacy of the states to adjudicate and administer water rights and to exercise jurisdiction over the management and use of water resources be recognized by passage of Federal legislation barring FERC from including any provision in a license which is in conflict with any existing water right established by the state in which the licensed project is, or would be, located or which would require and does not have state approval under the laws of the state in which the project is, or would be, located, and limiting the jurisdiction of FERC to matters pertaining to the safety of the project and to the orderly generation, transmission and use of power.

In the State of Texas, all surface water is the property of the State. This is because when the Republic of Texas was annexed to the United States, it did not relinquish its water. Anyone wishing to impound the State's water and put it to any beneficial use is required to obtain a permit for that purpose from the Texas Water Commission, the State agency through which the State's jurisdiction is exercised. Water rights holders in Texas are prohibited from altering their water rights in any respect without permission from the State. Texas reserves to itself the right to determine whether a change in the permit and the use of its public waters is beneficial and in the public welfare of all the people of Texas.

Respect for the primacy of State water law is already embodied in the Federal Power Act, specifically Section 821:

> Nothing contained in this Chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water

used in irrigation or for municipal or other uses, or any vested right acquired therein.

Nevertheless, recent court decisions have caused confusion and left uncertain the effect of the law and the intent of Congress with regard to this issue. Accordingly, the Congress should now make clear, and can by the passage of S. 106, that there is no question that it intends the Federal Energy Regulatory Commission to follow the well-established precedent recognizing the primacy of State law relating to the appropriation and distribution of water. To do otherwise would be to countenance the usurpation by the Federal bureaucracy of the States' rightful jurisdiction over the management and use of their surface waters. Such decisions are rightly vested with the States.

EL DORADO COUNTY WATER AGENCY,
Placerville, CA, June 3, 1991.

Hon. BILL BRADLEY,
Chairman, Senate Subcommittee on Water and Power, U.S. Senate, Washington, DC.

Re: S. 106

DEAR CHAIRMAN BRADLEY: The El Dorado County Water Agency (Agency) of Placerville, California, asks that you include its views expressing opposition to S. 106 in the hearing record for that bill.

The Agency recently filed with the Federal Energy Regulatory Commission an application for a preliminary permit to study a multipurpose water project on the South Fork American River (FERC Project No. 11017). The Agency is currently jointly studying such a project with the Sacramento Municipal Utility District of Sacramento, California. The primary benefit of the project to the Agency would be a badly-needed water supply for consumptive uses.

The Agency was also a joint applicant with the El Dorado Irrigation District for the South Fork American River Project, FERC Project No. 2761, which was licensed during the 80's, but the license for which was subsequently surrendered because of the inability to finance the project following the severe downturn at that time in the price of energy alternatives (oil).

The Agency is thus very familiar with the FERC licensing process and the difficulties of that process. These difficulties include conflicting claims and jurisdiction by other agencies, and a lengthy licensing process which can wear thin or wear out the financial and manpower resources of a license applicant. There is thus a need for the hydroelectric "streamlining" provisions included within S. 341, and concomitantly, there is a clear need to oppose the provisions of S. 106.

S. 106 would add major uncertainty to the FERC licensing process, and discourage investment in new and improved hydroelectric projects. To allow state water rights permitting authorities the last word on license conditions, such as minimum flow provisions, would be a significant deterrent to development of additional hydroelectric capacity in this country, and the Agency believes that would be a serious mistake. We should be developing alternatives to oil, including hydroelectric power, which will make the U.S. more energy self-sufficient.

Furthermore, the continuing California drought has made very clear the need to develop additional storage capacity. Such storage capacity will present opportunities for hydroelectric development which should be encouraged.

Finally, we do not understand the perceived need held for S. 106 when it is our understanding that FERC has never, by its licensing action, adversely affected established state water rights. We think the existing regulatory scheme, whereby FERC must take account of state fish and wildlife agency recommendations and state comprehensive water development plans, but where FERC has the final authority for setting minimum flows, is working well, and should not be so dramatically altered as S. 106 would do.

We, therefore, urge your opposition to S. 106, and hope that the Committee will not report out the bill.

Sincerely,

ROBERT J. REEB,
General Manager.

CALAVERAS COUNTY WATER DISTRICT,
San Andreas, CA, May 31, 1991.

Hon. BILL BRADLEY,
Chairman, Senate Subcommittee on Water and Power, U.S. Senate, Washington, DC.

Re: Senate Bill 106

CHAIRMAN BRADLEY: Calaveras County Water District (CCWD) of San Andreas, California, hereby submits its views opposing Senate Bill 106 (S. 106) and asks that these views be made a part of the hearing record on the Bill. CCWD is a FERC Licensee of the North Fork Stanislaus River Hydroelectric Project, FERC Project No. 2409. This project has a capacity of more than 200 megawatts and is a source of consumptive water, recreational, fish and wildlife and other benefits. CCWD has also recently jointly filed a preliminary permit application with Northern California Power Agency to study additional hydroelectric resources.

It is CCWD's view that the Federal Government should be encouraging hydroelectric development, such as by the hydropower "streamlining" provisions included in the Johnston-Wallop National Energy Security Act (Senate Bill 341) rather than discouraging it, as the provisions of S. 106 would do. CCWD has undergone the rigorous, exhaustive and repetitive licensing process, and understands firsthand the need for provisions which reestablish the primacy of the FERC's role in the licensing process. On the other hand, provisions of S. 106 would contribute to the very problem that the hydro licensing streamlining provisions of S. 341 are intended to mitigate. S. 106 would discourage investment in new projects, and investment in project improvements, because it would mean uncertainty in the water supply available for hydroelectric production. State attempts to impose changes in minimum instream flows, i.e., under public trust doctrine, could be devastating to project investment and hydroelectric production.

CCWD does not understand the perceived need for this legislation when there has been no clearly demonstrated problem with the existing regulatory scheme. To our knowledge the FERC has never adversely affected established water rights by its licensing actions. If it is not broke—why fix it?

In summary, CCWD clearly believes it would be a mistake to enact the provisions of S. 106. It is hopeful that the Committee will NOT report out the bill.

Thank you for your consideration of CCWD's views. Feel free to contact me if you have any questions.

Sincerely,

STEVE FELTE,
General Manager.

STATE OF IDAHO,
OFFICE OF THE ATTORNEY GENERAL,
Boise, ID, June 17, 1991.

Hon. BILL BRADLEY,
Chairman, Committee on Energy and Natural Resources, Subcommittee on Water and Power, U.S. Senate, Washington, DC.

Hon. PHILIP R. SHARP,
Chairman, Subcommittee on Energy and Power of House Committee on Energy and Commerce, U.S. House of Representatives, Washington, DC.

Re: Response of Larry EchoHawk, Attorney General, State of Idaho, to Testimony Opposing S. 106 and H.R. 649

GENTLEMEN: This letter is in response to testimony opposing H.R. 649 before the House Subcommittee on Energy and Power on June 4, 1991, and testimony opposing S. 106 before the Senate Subcommittee on Water and Power on June 5, 1991. Please include this letter in the hearing records for S. 106 and H.R. 649.

Several of the witnesses asserted that the proposed legislation would undermine the authority of FERC to promote national energy policies adopted by the Congress. This statement is true only if a national energy policy exists, the only means of achieving it is through hydropower, and the most important use of the nation's water resources is hydropower. None of these assumptions, however, are valid.

The proposed legislation is carefully crafted to reinstate the original intent of Congress to defer to state water laws while ensuring that FERC retains paramount authority to protect and promote national interests in the development of private hydropower facilities. The legislation requires that only licensees obtain water rights in accordance with state law. Such provision does not undermine national in-

terests, but provides additional checks and balances to ensure protection of existing and future interests in the uses of water.

It is specious to assert that states will destroy the economic viability of hydropower projects or will ignore the concerns of interstate, regional, Indian or national interests. States share Congress' concern for responsible development of economically-viable hydropower projects. In addition to retaining FERC's authority to protect interstate, regional, Indian and national interests through the licensing process, the legislation retains the regulatory authority of other federal agencies relating to private hydropower projects. Licensees must continue to obtain Section 404 dredge and fill permits from the Corp of Engineers, must comply with fish passage requirements prescribed by the Secretaries of Commerce and Interior, and must procure applicable right-of-way permits from the U.S. Forest Service and Bureau of Land Management.

Several of the witnesses suggested that FERC has exercised sole authority over hydropower water rights for the last 70 years and that the proposed legislation would upset the "careful balance" established during that period of federal control. William Scherman, General Counsel of FERC, implied that the proposed legislation would completely reverse the intended role of the states in hydropower licensing, and asserted that in enacting the Federal Power Act (FPA) Congress intended to vest FERC with the "exclusive authority" to consider and balance public interest issues. Quite to the contrary, Congress intended to "harmonize" state and federal interests by conditioning issuance of the federal license upon full compliance with state laws controlling the diversion and use of water. In such a manner, both state and federal interests were represented and protected during the licensing process. See 56 Cong. Rec. 9110, 9813 (1918).

The reports of FERC's predecessor, the Federal Power Commission (FPC), affirm the intent of Congress to preserve state authority over water rights. For example, in its 1931 Annual Report, the FPC stated:

> Congress, in this legislation [the FPA], perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges, and benefits of the State in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantage of its citizens.

FPC, Eleventh Annual Report 12 (1931).

In earlier reports, the FPA confirmed that "[u]nder the Federal water power act a license may not be issued until an applicant has secured its water rights from an appropriate State authority." FPC, Fourth Annual Report 10-11 (1924). It was not until after the Supreme Court's decision in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission* that the FPC changed its interpretation of the FPA. FPC, Twenty-Sixth Annual Report 92-94 (1946). Even then, the FPC and its successor, FERC, continued to defer to state laws regarding the acquisition and use of water rights until the later part of the 1970s.

FERC's reliance on the Supreme Court's decisions in *First Iowa* and *California* v. *FERC* is misplaced, since those decisions do not reflect the original congressional intent to avoid preemption of state water laws. The Court's statement's in *First Iowa* regarding the supposed preemptive effect of Section 27 of the FPA were merely extraneous, since the Court's actual holding turned solely upon its conclusion that Section 9(b) does not require compliance with state law as a condition precedent to the issuance of a federal license.

In *California* v. *FERC*, the Court recognized the weaknesses of the *First Iowa* opinion, but felt compelled to adhere to what it believed to be established precedent, stating "it is more important that the applicable rule of law be settled than that it be settled right." The Court was also influenced by the fact that the holding in *First Iowa* was purely a matter of statutory interpretation and any misunderstanding of congressional intent could be corrected through appropriate legislation.

FERC has seized on the Supreme Court's misconstruction of the FPA and moved aggressively to preempt any meaningful state role in FERC licensing decisions. Mr. Scherman's statement that FERC "is extremely sensitive to the States' concerns" is not reflected in the recent actions of FERC. In the last decade, FERC has abandoned any semblance of respect for state water laws and policies and has instead asserted that it may control the water rights of non-hydropower uses affecting FERC-licensed projects as well as hydropower water rights.

This is easily demonstrated by comparing two FERC licensing decisions within the state of Idaho. The first decision, in 1955, deferred to the state's traditional policy of subordinating hydropower water rights to allow future upstream development by other water users. *Idaho Power Co.*, 14 Fed. Power Comm'n Reports 71, 81 (1955).

The second decision, issued in 1988, refused to add similar subordination language to a hydropower license for a project on the Payette River. Instead, FERC suggested that the State could petition FERC for an amendment of the hydropower license each time an application was made to the state for a future upstream use. 42 F.E.R.C. 61,320, 61,325-26 (1988). Requiring the state to go through the unwieldy FERC process for amendment of existing licenses each time a water use application is filed is highly impractical, since dozens of water use applications are filed in that watershed every year, most of which are so small as to have little if any effect on the quantity of water available for the hydropower project.

Witnesses opposing the proposed legislation also asserted that it would result in disjointed and uncoordinated operation of rivers and destroy the ability of dam operators to coordinate water releases, especially in the Columbia River Basin. One witness also implied that state interests in regulation of water use are largely unaffected by hydropower projects since they are basically nonconsumptive. The exact opposite is true, however. If FERC is allowed to continue its present policy of asserting exclusive authority to make water allocation and regulatory decisions both for hydropower projects and water uses affecting hydropower projects, the resulting polarization of authority between FERC and the States will disrupt established water delivery systems which are carefully designed to coordinate all water uses to ensure the most efficient use of water in times of scarcity.

It is also misleading to imply that hydropower water rights are basically nonconsumptive and therefore fall outside traditional state powers over "proprietary" water rights. The term "proprietary" refers only to whether a water right is privately owned; it does not refer to whether the right is consumptive or nonconsumptive. Both consumptive and nonconsumptive water rights are the subject of traditional state regulation. Furthermore, many hydropower projects are consumptive in nature, and have the ability to entirely dewater entire stretches of streams.

An example best illustrates the problems inherent in FERC's preemption of traditional state water regulation. In the western states, water is distributed to users on the basis of priority dates, which are established by the date the user first used the water or applied to use the water. In scarce water years, it is often necessary to cut off water to "junior" users in order to deliver water to "senior" users with an earlier priority date. In order to ensure delivery to a senior water user on the date he or she will be able to use the water, it may be necessary to stop diversions by lower priority junior users, who may be up to several hundred miles upstream. The cutoff of upstream diversions must be precisely timed to ensure the needed amount of water will be flowing through the proper stretch of the river on the required date. Such timing must account for all water uses, since each use may affect the rate of water flow through the river system. Hydropower projects, even if nonconsumptive, strongly influence water flow through river systems due to their storage and release capabilities. If FERC takes it upon itself to establish its own set of rules controlling water usage by the hydropower projects, a state will not be able to control the flow of water through the river system and will not be able to deliver water to downstream users with any certainty. The result will be increased conflict between water users and interference with vested water rights.

Witnesses opposing the legislation also suggested that the bill would adversely affect efforts to obtain instream flows for fish, wildlife and recreation. Assertions that FERC is more sensitive than the states to the need for instream flows are overbroad and unfounded, as demonstrated by FERC's approval of the Rock Creek Hydroelectric Project, the decision that was reviewed by the Supreme Court in *California* v. *FERC*. There, in order to protect an important fishery, the California State Water Resources Control Board required the project owner to maintain instream flows of between 30 and 60 cubic feet per second (cfs). 38 F.E.R.C. 61,771, 61,772 (1987). In contrast, FERC required the project owner to maintain flows of only 11 to 15 cfs, an amount insufficient to protect the fishery. *Id.*

Several of the witnesses also intimated that state interests are adequately protected by the provisions of the Electric Consumers Protection Act of 1986 (ECPA), pointing especially to Section 10(j), which calls for FERC to adopt license conditions recommended by state fish and wildlife agencies unless FERC finds that the recommendations are inconsistent with governing law. Ignoring the fact that this provision does nothing to protect state interests in uses of water other than for fish and wildlife, this provision has not proven effective in practice. A prime example is again the *Rock Creek* decision, where FERC rejected the recommendations of the California Department of Fish and Game (CDFG) for minimum stream flows of 30 and 60 cfs below the Rock Creek Hydropower Project. FERC rejected CDFG's recommendations on the simple basis that such flows may have caused the operator to suffer financial losses during certain years of the project's life span, although it de-

termined that the project would be profitable over the 50-year term of the license. 38 F.E.R.C. 61,771, 61,773 (1987). Thus, FERC rejected the state's recommendations not on the basis of any national policy or federal law but solely out of concern for the operator's profit margin.

Witnesses representing Indian tribes raised concerns that the proposed legislation would infringe upon the creation and administration of federal and tribal reserved water rights. Nothing in the bill, however, is intended to change substantive federal laws reserving sufficient water to fulfill the primary purposes of federal reservations. Nor would the legislation amend existing rules of law regulating the respective boundaries of state, federal and tribal authority within Indian reservations. Moreover, state management of water will prove more protective of anadromous fisheries important to many Indian tribes in the Pacific Northwest. FERC-licensed hydropower projects, in conjunction with Army Corps of Engineers projects, have decimated many of the once-massive runs of salmon and steelhead in the Pacific Northwest and Northern California. The states' willingness to promote and protect anadromous fish runs is not shared by FERC.

One witness, Jerome C. Muys of the National Hydropower Association, suggested that the bill would radically affect the law regarding federal reserved water rights for hydropower projects located on federal lands. Such assertion, however is based on Mr. Muys' unique interpretation that Section 24 of the FPA impliedly creates federal reserved water rights once a private party applies to FERC to develop a hydropower project on lands of the United States. No court has ever recognized federal reserved water rights for the benefit of a private hydropower developer, nor is such a radical interpretation of the federal reserved water rights doctrine ever likely to be sustained. Federal reserved water rights are intended to fulfill public purposes promoted by federal land withdrawals, and such water rights will remain unaffected by the proposed legislation.

It was also suggested that the proposed legislation would delay hydropower licensing. Nothing in the bill, however, requires FERC to wait until the state water right process is completed before going forward with licensing proceedings. Furthermore, the bill requires compliance with state water laws only where a state has a permit system in place for the allocation of water rights. Many eastern states do not have such permitting processes.

In summary, S. 106 and H.R. 649 promote the efficient use of scarce water resources while retaining the traditional relationship between FERC licensing processes and state regulation. Fifty years of state control of hydropower water rights conclusively disproves the assertions that reinstating traditional state authority will throw the development of hydropower into "chaos." The states have a proven track record of effectively balancing scarce water resources in order to allow successful development of hydropower projects while protecting environmental concerns and other water users.

Sincerely,

LARRY ECHOHAWK,
Attorney General.

EDISON ELECTRIC INSTITUTE,
Washington, DC, June 27, 1991.

Hon. BILL BRADLEY,
Chairman, Subcommittee on Water and Power, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: At a hearing held by your Subcommittee on June 5, 1991 regarding S. 106, you posed questions to several witnesses about the ability of states to set aside instream flows as vested water rights and to have those flows recognized by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). On behalf of the Edison Electric Institute (EEI), I would like to provide this letter for the record in response to those questions and discussion surrounding the issue.

The *Rock Creek* case itself, which the sponsors of S. 106 have indicated the bill is meant to overturn, did not involve vested instream flow rights. Rather, it involved an attempt by the state of California to impose flow requirements on a hydro project licensed by FERC, in contravention of FERC's licensing authority under the FPA.

Indeed, to our knowledge, the issue of vested instream flow rights has not yet arisen in a specific case either before FERC or in the courts. As a result, neither FERC nor the courts have had a chance to respond to the situation posed by your

questions. Thus, EEI believes that it is both premature and unnecessary for Congress to amend the FPA to respond to the issue you have raised.

As we understand it, Idaho's interest in S. 106 is not to preserve vested instream flow rights. Quite the contrary. The state wants to be able to impose conditions on hydro projects that would allow the state to take water from those projects to satisfy future, *unvested* irrigation and other uses of the water.

As our witness, Mr. Robert J. Haywood, Vice President of Pacific Gas and Electric Company, indicated during his remarks, his company obtains any necessary water rights from its state in order to operate its projects. Those of our members with whom we have discussed this issue say they too obtain state water rights for their projects when state law requires this. Project owners recognize the important role that states play in managing the nation's water resources and the importance of maintaining good working relations with the states.

EEI understands that the state of California may be revisiting its position in the *Rock Creek* case and its support for S. 106. We wonder whether other states will follow suit as they become aware of the potential consequences of the bill.

Given the wide range of opposition to S. 106 and the fact that we do not perceive a problem with regard to instream flow issues or other issues the bill may be intended to address, we respectfully suggest that there is no need for the legislation.

Thank you for the opportunity to submit these supplementary comments.

Sincerely,

WALKER F. NOLAN,
Executive Vice President.

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